93-613

No. 93——

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TESORERIA GENERAL DE LA
SEGURIDAD SOCIAL DE ESPAÑA,
Petitioner,

v.

BANCO DE CREDITO INDUSTRIAL, S.A.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Where the competent executive agency of a foreign government provides a United States court with the interpretation of a treaty to which it, and not the United States, is a signatory, and which applies as foreign law to a dispute exclusively between citizens of the foreign nation, can the United States court usurp the power of the foreign sovereign by unilaterally disregarding such interpretation in favor of its own, in violation of judicial restraint, principles of treaty interpretation, and international comity?

LIST OF INTERESTED PERSONS AND RULE 29.1 NOTATION

The parties to the proceedings at the United States Court of Appeal for the Fifth Circuit were petitioner, Tesoreria General de la Seguridad Social de España, respondent, Banco de Credito Industrial, S.A. now Banco Exterior de España, S.A., and the crewmembers of the STOLT LUISA PANDO and the STOLT MARIA PANDO. The only parties having an interest in the instant petition for certiorari are Tesoreria and BCI.

Petitioners certify that they have no parent or subsidiary companies to be listed under this Court's Rule 29.1.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Tesoreria General de la Seguridad Social De España (hereafter "Tesoreria"), respectfully asks this Court to grant certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in consolidated civil proceedings on May 14, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, which is reported at 990 F.2d 827 (1993), is reprinted in the appendix hereto as Appendix A, pp. 1a-25a, *infra*.

The minute entries and judgments of the United States District Court for the Eastern District of Louisiana that

were the subject of the appeal are unpublished and are reprinted as Appendices B, C and D, pp. 26a-35a, *infra*.

JURISDICTION

This suit is based on the Court's admiralty and maritime jurisdiction and arises out of the arrest and subsequent judicial sale of two vessels, the STOLT LUISA PANDO and the STOLT MARIA PANDO, pursuant to Rule C of the Supplemental Admiralty Rules of the Federal Rules of Civil Procedure. Numerous claimants intervened in the consolidated proceedings to enforce alleged maritime liens and to foreclose on first preferred ship mortgages.

Petitioner, Tesoreria, the Spanish Social Security System, filed a claim for a preferred maritime lien for unpaid contributions on behalf of Spanish crewmen who served aboard the vessels. The District Court granted summary judgment in favor of respondent, Banco de Credito Industrial, S.A., now Banco Exterior de España, S.A. (hereafter "BCI"), denying Tesoreria's claim and giving BCI's Spanish preferred ship mortgages priority (Appendix B, pp. 26a). Judgment was entered on August 1, 1991 (Appendix C, pp. 33a-34a) and petitioner's Motion for New Trial or to Alter or Amend Summary Judgment was denied on September 30, 1991 (Appendix D, p. 35a). Petitioner appealed to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. 1291 and 1292(a)(3). The Fifth Circuit issued its opinion on May 14, 1993 (Appendix A, pp. 1a-25a), affirming the District Court's holding. Petitioner filed a petition for rehearing, which was denied without reasons on July 19, 1993 (Appendix E, pp. 36a-38a).

Petitioner now invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1), having filed its petition within the time period provided by 28 U.S.C. § 2101(c) and this Court's Rule 13.1.

STATUTES INVOLVED

This case does not implicate any United States statutes. It invokes application of Spanish law, more particularly Article 2(2) of the 1926 International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, Brussels, April 10, 1926 (Appendix J, pp. 55a-65a).

STATEMENT OF THE CASE

A. Preface

This case raises significant international and federal question issues involving international comity, recognition and application of foreign treaties, and the abuse of judicial powers by United States courts. The lower courts erred in fundamental points of treaty interpretation, and their holdings impermissibly and unnecessarily infringe upon the sovereignty of a foreign nation by eviscerating Spain's interpretation of its own law. The dangerous precedent set by this decision will have ramifications of an international, legal, and diplomatic nature, far beyond the facts of the case. Intervention by this Court is appropriate to rectify the incorrect procedure, analysis, and conclusion of the lower courts.

The dispute in this case centers around application of Spanish law, specifically the 1926 Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages (hereafter "1926 Convention") (reproduced at Appendix J, pp. 55a-65a). Spain is a signatory to the 1926 Convention and has incorporated its provisions into Spanish domestic law. Since it is conceded that Spanish law was the applicable law, United States courts simply had to apply the 1926 Convention as interpreted by Spain.[1] The government of

[1] Although the relevant provisions of the 1926 Convention are arguably susceptible to more than one interpretation, and indeed are interpreted differently by signatory nations, the only relevant interpretation to this case is Spain's, particularly since the United States is not a signatory to the 1926 Convention.

Spain, through the Ministry of Public Works and Transportation, Office of the General Secretary of Transportation, General Directorate of the Merchant Marine (hereafter "General Directorate"), the ministry charged with determining and applying Spanish law in respect to maritime liens, provided the Spanish interpretation of the 1926 Convention.[2] The District Court for the Eastern District of Louisiana, and subsequently the Court of Appeals for the Fifth Circuit, completely ignored the General Directorate's declarations, and instead substituted their own analysis and interpretation of the 1926 Convention in place of Spain's.

This matter is deserving of granting a writ of certiorari to determine the correctness of the fundamental point resolved by the lower courts; i.e. the basis for their treaty interpretation. The critical issue is the correctness of a United States court's ignoring a foreign nation's interpretation of a treaty to which it, and not the United States, is a signatory, in favor of the court's entirely inconsistent interpretation. It is submited that the faulty reasoning of the lower courts needs to be rectified so that the same fundamental errors are not repeated in future cases of treaty interpretation. Because these questions raise compelling issues of international law, and the extent to which the United States judiciary can infringe on the rights of a foreign nation to determine, regulate, and enforce its domestic policy, they are particularly well-suited for review by this Honorable Court. This Court's own stated criteria squarely apply for granting of writs in this matter. ". . . [t]he object of granting writs of certiorari on points of statutory or treaty interpretation is to

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[2] The district court was provided a letter from Mr. Cruz Ruiz (on the staff of the General Directorate) and an affidavit of Mr. Rodriguez Carrion, both representatives of Spain at international meetings on the topic of maritime liens and mortgages, (Appendices F & H, pp. 39a-42a and 45a-53a). The Fifth Circuit was also provided the declaration of the General Director himself (Appendix G, pp. 43a-44a).

determine the correctness of fundamental points that lower courts have resolved, not to assume those points to be correct in order to decide particular cases on reasoning useless elsewhere," *Chan v. Korean Air Lines Ltd.*, 490 U.S. 122 (1989), page 134, n.5.

B. District Court Proceedings

Petitioner, Tesoreria, is the Spanish Social Security Administration. Respondent, BCI, is a quasi governmental Spanish bank which held first preferred mortgages on two Spanish vessels, the STOLT MARIA PANDO and the STOLT LUISA PANDO. The vessels were owned and operated by a Spanish corporation, Maritima Antares. Maritima Antares employed Spanish crewmen aboard its vessels, on behalf of whom it was obligated to pay social security contributions to Tesoreria. Maritima Antares failed to pay the contributions, giving rise to the instant claim.

The STOLT LUISA PANDO and the STOLT MARIA PANDO were arrested by creditors under parallel proceedings in New Orleans, Louisiana and Houston, Texas. Tesoreria intervened in these proceedings to assert its preferred maritime lien for unpaid social security contributions. The proceedings were consolidated in New Orleans and the vessels were eventually sold, with the sale proceeds substituting for the res.

Ranking of the lien claimants was governed by the procedural law of the forum, whereas the issue of whether a claim gave rise to a substantive maritime lien was governed by Spanish law. With regard to Tesoreria's claim, the district court's narrow judicial function was simply to determine and apply Spanish law. As stated previously, Spain has adopted the provisions of the 1926 Convention as its substantive law governing the creation and existence of maritime liens. Article 2(2) of the 1926 Convention states that a preferred maritime lien exists in favor of all "claims arising out of the contract of engagement of the

master or crew of a vessel." *Tesoreria* submitted the declaration of Mr. Jose Antonio Cruz Ruiz (Appendix F, pp. 39a-42a) to the court, setting forth the Spanish position, which is, and always has been, that this broad language encompasses social security contributions. Since that was the official Spanish position, no additional source or analysis was required, and the inquiry should have ended with the court's perfunctory application of that law.

However, in order to clear up confusion created by BCI, Tesoreria also submitted evidence that Spain's interpretation of Article 2(2) was identical to the interpretation of other countries (France, Belgium, Italy), and was well supported by the history of the treaty, by Spanish non-maritime domestic law on the issue, by learned independent experts, and by the stated position of Messrs. Rodriguez Carrion (Appendix H, pp. 45a-53a) and Cruz Ruiz (Appendix F, pp. 39a-42a), representatives of the Spanish government at meetings related to amendment of the 1967 Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages (hereafter 1967 Brussels Convention). Although the district court had evidence of, and support for, Spain's official interpretation of the 1926 Convention, it interpreted Article 2(2) of that Convention by referring to the court's understanding of discussions relating to the *1967* Convention (to which Spain is not a signatory).

The court completely discounted declarations of any Spanish source regarding Spanish law, impermissibly interpreted the 1926 Convention in its own fashion, and held that Article 2(2) could not include social security contributions as wages, or their equivalent, and thus were primed by BCI's mortgages (*See* Minute Entry and Judgment, Appendices B & C, pp. 26a-34a). The district court subsequently denied Tesoreria's Motion for New Trial or to Alter or Amend Summary Judgment (Appendix D, p. 35a).

C. Proceedings Before the Fifth Circuit

Petitioner lodged an appeal with the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit deviated worse than the district court in its analysis. Instead of even attempting to ascertain and apply Spain's interpretation of Article 2(2) the court went on an academic journey in pursuit of its own preferred treaty interpretation, and improperly substituted its own judgment concerning how the 1926 Convention *should be* interpreted, for the official interpretation of Spain (Appendix A, pp. 1a-25a). The court ignored the pronouncements of the Spanish government representatives and astoundingly digressed into an analysis of whether Spain had adopted specific enacting legislation pursuant to the Protocol of the 1926 Convention, arguing that this was the only fashion in which a country could recognize the existence of a maritime lien for social security contributions. The court failed to recognize that Spain has simply adopted wholesale the provisions of the 1926 Brussels Convention and incorporated those provisions into its domestic laws. Spain's interpretation, i.e., its treaty intent, was that no specific additional legislation was necessary and Article 2(2) was effective on its own.

The court failed to explain why it was necessary to completely discredit the Spanish government's interpretation of the treaty, or on what authority it could substitute its own. After applying its novel treaty interpretation, it admittedly and impermissibly "digressed into the familiar" and relied on totally inapplicable United States law [3] to accommodate its incorrect view of the merits, entirely ignoring the fact that Spain already had spoken on the treaty and there was no need to re-interpret it.

The court was obviously confused from the outset as to its proper limited judicial function, as it requested guid-

[3] The Court relied on cases pertaining to pension funds and withholding taxes for the proposition that United States law does not recognize a lien for social security contributions.

ance on treaty interpretation. Not until oral argument at the Fifth Circuit was the question ever raised as to the manner in which a treaty should be interpreted. This had not been addressed by the parties for the obvious reason that "treaty" interpretation was never an issue. The only question, as the briefs of the parties correctly reveal, was simply what was Spanish law. There was never any need for the court to "interpret" any treaty, only to determine what was *Spain's* interpretation of the 1926 Convention and then to apply that interpretation to the facts.[4]

By engaging in intellectual gymnastics concerning how the 1926 Convention might be interpreted, the Fifth Circuit ignored the obvious: Spanish law alone applies to this dispute and Spain's official position is the only interpretation that matters. However, relying on its own novel flexing of judicial powers and its interpretation of Article 2(2), the court affirmed the district court's holding (Appendix A, p. 25a).

Petitioner filed a petition for rehearing, attaching the declaration of the Director General of the Spanish Merchant Marine himself, Mr. Rafael Lobeto Lobo (Appendix G, pp. 43a-44a). The declaration reconfirmed Spain's official interpretation, and was supported by an affidavit from the Spanish Consulate in New Orleans verifying that the Director General is the highest Spanish authority on maritime liens and mortgages (Appendix I, pp. 54a). Furthermore, the court was alerted to the possible international and diplomatic ramifications of, and the shock of the Spanish authorities to, its decision, yet it simply denied rehearing without reasons.

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[4] There is a substantial difference between intellectually interpreting a treaty in a vacuum, and determining the interpretation and intent of a signatory to the treaty. The Fifth Circuit incorrectly chose the former route.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT IMPERMISSIBLY EXCEEDED ITS JUDICIAL POWERS AND ENGAGED IN TREATY MAKING.

The Fifth Circuit impinged on the sovereignty of Spain, violated principles of international comity among nations and established principles of treaty interpretation, and exceeded its judicial powers. In substituting its own interpretation of the 1926 Convention for the interpretation given to it by the competent Spanish government authority, the Fifth Circuit thereby engaged in treaty making, an activity not within its judicial powers. *The Amiable Isabella* 5 L.Ed. 191 (Wheat 1821). In imposing its will as treaty-maker, the court failed to properly defer to Spain's interpretation of the 1926 Convention and usurped Spanish authority.

This Court has consistently held that the judiciary is limited to "give effect to the stipulation of [a] treaty in the manner and to the extent to which the parties [to it] have declared, and not otherwise." *The Amiable Isabella* 5 L.Ed. at 208. This is always the case, even if a court has been motivated by "equity or general convenience, or substantial justice." *Id.* Only the parties which are signatories to the treaty are competent to change its terms. *Id.*

A treaty *must* be interpreted so as to carry out the intention of its signatories. *Tucker v. Alexandroff*, 183 U.S. 424-437 (1892). *See* also, *Sumitomo Shoji America Inv. v. Avagliano*, 457 U.S. 176 (1982). Thus, the role of the court is limited to ascertaining and enforcing the intent of the signatories as *they* themselves have declared it (in this case only Spain), and *not* to deciding the preferred interpretation of the court.[5] However, the Fifth Circuit turned

[5] The court's analysis of the Protocol and whether or not Spain had effectively brought itself therein, and its analysis of what it thought the drafters of the 1926 and 1967 Conventions meant, is totally academic and inapplicable to the narrow issue in this case.

a blind eye to the stated position of the Spanish Government and to this Court's precedents and instead "[looked] first at the text of the legislation and then to any custom . . . and [finally] . . . to judicial decisions to the extent they fill in gaps left by law or custom," (Appendix A, p. 12a). Such an exercise, although academically accurate, is inapplicable in a case where the court is *not per se* interpreting a treaty, but only determining a foreign nation's interpretation of the treaty. It is also certainly not applicable in a case where that foreign nation has expressly provided the Court with the opinion of its competent authority concerning the proper interpretation. Whether Spain's interpretation might not be to the liking of a particular United States court, or may be a minority view, or whether the court feels that Spain's interpretation may not be the most intellectually or procedurally preferred method of treaty interpretation, is wholly irrelevant. Indeed, what anyone else thinks or says about how the treaty should be interpreted is of no moment when Spain's position is all that is legally required. To go beyond Spain's interpretation, and beyond the task of simply applying that interpretation, exceeds the permissible bounds of the court's function.[6]

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[6] The Fifth Circuit might have been more correct if the United States were a signatory, or if it were acting as an international tribunal passing judgment on proper treaty reading. It is not correct in the context of applying Spanish law to a matter over which it fortuitously has jurisdiction. An international tribunal seeks to determine the meaning of a treaty as a matter of international law. A Spanish court interpreting the same treaty seeks to determine its meaning for purposes of its application as domestic law. The 1926 Convention clearly is the domestic law of Spain. It is improper and incorrect for a United States court to do anything different than what a Spanish court could do faced with this issue: *See* 1 Restatement (Third), The Foreign Relations of the United States § 325, comment 4. The United States court is essentially sitting as a Spanish court, not an international tribunal, and is bound by Spanish substantive law.

For United States courts to ignore the specific intent of Spain and substitute their own interpretation is an abuse of discretion, an improper judicial function, and an affront to Spain's sovereignty. Unquestionably the declaration of the Spanish General Directorate provided the manner and extent of Spain's interpretation of the 1926 Convention. That declaration *must* be given due deference, particularly where the United States is not even a signatory to the 1926 Convention. A United States court has absolutely no competence to change or even question the terms dictated by Spain.

> [T]o alter, amend, or add to any treaty, by inserting any clause whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.

The Amiable Isabella, supra, 5 L.Ed. at 208.

The Fifth Circuit's duties, functions, and, indeed, instructions could not be clearer. Thus, by exceeding its judicial powers, the court committed a procedural, legal and diplomatic *faux pas*, and in failing to defer to the intent of a treaty signatory engaged in impermissible treaty making.

II. IGNORING THE DECLARATION OF THE SPANISH AUTHORITY AND SUBSTITUTING ITS OWN INTERPRETATION OF FOREIGN LAW IS A VIOLATION OF ACCEPTED TREATY INTERPRETATION AND INTERNATIONAL COMITY, A USURPATION OF POWER, AND A WHOLLY UNNECESSARY AFFRONT TO THE SOVEREIGNTY OF A FRIENDLY NATION.

The Directorate General of the Merchant Marine is Spain's highest authority on maritime liens and mortgages (Appendix I, pp. 54a). It is undisputed that its word in that respect is Spanish law. Even United States law recognizes that ministries, departments and sections of foreign nations have the authority, power and recognition to negotiate, interpret and advise on what the terms of a treaty are and mean, and how they should be applied. Therefore, the nature and source of the applicable Spanish law is unquestioned in this case.

United States law is clear that "the meaning given [treaties] by the department of government particularly charged with their negotiation and enforcement is given great weight, *Kolovrat v. Oregon*, 366 U.S. 186, 194 (1961). Similarly, "the practice of treaty signatories counts as evidence of the treaty's proper interpretation since their conduct generally evinces their understanding of the agreement they signed" *United States v. Stuart*, 489 U.S. 353, 369 (1989). This practice is carried out by the administrative agencies charged with the treaty interpretation or execution; i.e. the Directorate General.

This Court has consistently held that when interpreting international treaties, courts must rely on the interpretations provided by the governmental departments whose duty it is to interpret and negotiate treaties. *Sumitomo Shoji America, Inc. v. Avagliano, supra.*

Lastly, "a court of the United States owes substantial deference to the construction [Spain] places on its domes-

tice law. Courts of this nation routinely accept plausible constructions of laws by the agencies charged with administering them," in *The Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992). *See* also, *Chevron USA Inc. v. National Resource Defense Council Inc.*, 467 U.S. 837 (1984). Clearly, the lower courts abused and exceeded their power, ignored the criteria established by this Court, and insulted Spanish sovereignty by not accepting a "plausible construction" of the 1926 Convention, provided to the courts by the General Directorate, the relevant and recognized Spanish authority.

Although the Spanish ministry charged with interpretation and enforcement of the relevant treaty provided direct evidence unequivocally setting forth Spain's official interpretation of Article 2(2) of the 1926 Convention (subsumed therein is the fact that Spain's reading of the Protocol is different than the Fifth Circuit's), for reasons of its own choosing the court ignored Spain's position and substituted its own analysis and interpretation of Spanish law. There is no justification for a United States court to refuse to allow Spain to interpret its own laws and treaties, especially where Spain has a substantial interest in doing so.[7] Nothing allows a United States court to go beyond the determination of the Directorate General, and certainly not to digress into its own academic exercise to reach its decision. Failure to recognize and defer to the interpretation of the 1926 Convention provided by the Spanish authority, is an outright affront to the government of Spain, a slap in the face to Spanish sovereignty, and

[7] As expounded upon by the Spanish officials and experts. Spain has a strong policy in favor of maintaining the primacy of social security contributions under its domestic law (*See* e.g. Appendix F, p. 39a and Appendix H, pp. 48a-52a). Whether or not Tesoreria's claim is afforded preferred status in this case has no impact on any other nation or any individuals other than Spanish subjects. (As stated above, Tesoreria, BCI, Maritima Antares and the crewmen are all Spanish entities.) There is no justification for the Fifth Circuit's decision to sabotage Spain's domestic policies.

contravenes United States Supreme Court precedent. Basically, the lower courts have told the recognized Spanish authority that it is less qualified than a United States court to properly interpret and apply Spanish law to Spanish subjects. This is a direct contradition of the professed American policy of global understanding and sends a message of insularity and disrespect for the laws, policies and sensitivities of other nations.

An example of a proper treaty analysis can be found in *The Matter of Oil Spill by the Amoco Cadiz, supra,* where the French authority provided a United States Court with its position on applicable French law. The Seventh Circuit correctly deferred to the French opinion and did *not* delve into an analysis of whether France's understanding of the law was correct: it simply accepted it and applied to because it was the position taken by the French state.

Alternatively, even if a United States court failed to intellectually accept the Spanish law and follow this Court's mandates on treaty interpretation, comity would still require it to apply the law provided by the relevant authority of the foreign nation.

> Comity is a recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another. It is not a rule of law, but one of practice, convenience, and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws. Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to it give it effect.

Somportex Limited v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3rd Cir. 1971) reh. den. 1971, cert. den. 405 U.S. 1017 (1972).

Comity and observance of international relations requires respect and recognition of the laws of foreign nations, regardless of whether said law evidences the preferred interpretation of a United States court. To ignore Spain's declaration regarding its own law violates comity, unnecessarily infringes on the right of Spanish authorities to regulate and determine matters affecting Spanish domestic policy, and fails to demonstrate due regard for international duty and convenience. The Fifth Circuit's actions threaten the mutual respect which nations must have for each other's laws and the trust and deference which nations must have in the information provided by the authorities of foreign countries.[8]

Furthermore, there was no basis to withhold comity in this case. Acceptance of comity, specifically acceptance and recognition of Spain's interpretation of the 1926 Convention, would not be contrary or prejudicial to the interests of the United States; how could it be, when the United States is not a signatory to the 1926 Convention and no United States parties are involved in this action? What does the United States care about the lien ranking in Spain of social security contributions? Comity is clearly applicable to this matter.

This is not simply a case where the court had to interpret foreign law without any guidance and chose a permissible interpretation of foreign law. To the contrary, Spain provided specific pronouncements concerning Spain's understanding, intent, and interpretation of a treaty, and this Court's precedent clearly set forth the manner in which that interpretation should be determined. Because of the gross violation of international comity and the usurpation of powers, and most importantly because of the direct

[8] What the Fifth Circuit has done is akin to a foreign court ignoring Congress' expression of legislative intent, or ignoring the United States State Department's official statement on the United States' understanding of a treaty to which it is a signatory and which will be applied to U.S. citizens. Certainly the U.S. would not take kindly to such a result, likewise, neither has Spain.

affront to Spain in ignoring the pronouncement of its own treaty law by the competent authority, the Ministry of Foreign Relations of Spain is presently studying an appropriate response. Petitioner understands that the Ministry of Foreign Affairs is preparing a diplomatic note to this Court regarding the failure of a United States court to recognize and apply the opinion of the General Directorate as Spain's official government position. If this court grants certiorari, the Ministry of Foreign Affairs may submit an amicus curiae brief. The American Bar Association, section on International Laws, is also aware of the violation of international legal principles which has occurred and might consider submitting an amicus curiae brief.[9] Suffice it to say that this decision has caused a stir in international and diplomatic circles where sensitivities regarding proper interpretation of treaty law and sovereignty, and recognition and respect of foreign authorities, are supreme.

The usurpation of powers and affront to the government of Spain cannot be overlooked or ignored, as it would completely upset the delicate balance upon which nations mutually recognize and grant deference to the treaties, laws, interpretations, intent, and policies of other sovereigns. Legal and diplomatic chaos would ensue if the courts of each country unilaterally interpreted the way they believe another country should interpret a treaty, and disregarded, for no reason, the valid stated interpretation of laws and objectives of other nations.

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[9] The Department of State of the United States, Spanish desk, has also been contacted and, not surprisingly, their position was of non-involvement, and of total and complete deference to the Spanish authority, since the U.S. is not a signatory to the 1926 Convention.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that in view of the issues of substantial international importance which exist in this case, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October 18, 1993

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 91-3922, 92-3100 and 92-3298

BANCO DE CREDITO INDUSTRIAL, S.A.,
Plaintiff-Appellee,

v.

TESORERIA GENERAL DE LA,
Intervenor-Appellant,

v.

STOLT LUISA PANDO MT.,
Defendants.

PARCEL TANKER, INC.,
Plaintiff,

and

BANCO DE CREDITO INDUSTRIAL, S.A.,
Plaintiff-Appellee,

v.

TESORERIA GENERAL DE LA,
Intervenor-Appellant,

v.

STOLT LUISA PANDO, MT., *et al.*,
Defendants.

WOODHOUSE DRAKE & CARRY, LTD.,
Plaintiff,

and

BANCO DE CREDITO INDUSTRIAL, S.A.,
Plaintiff-Appellee,

v.

TESORERIA GENERAL DE LA,
Intervenor-Appellant,

v.

STOLT LUISA PANDO MT.,
Defendant.

BANCO DE CREDITO INDUSTRIAL, S.A.,
Plaintiff-Appellee,

v.

TESORERIA GENERAL DE LA,
Intervenor-Appellant,

v.

M/T STOLT MARIA PANDO, *in rem, et al.*,
Defendants.

BANCO DE CREDITO INDUSTRIAL, S.A.,
Plaintiff-Appellee,

v.

STOLT LUISA PANDO MT.,
Defendants,

FELIX ACHA FERNANDEZ, *et al.*, CREWMEMBERS OF
STOLT LUISA PANDO MT.,
Intervenors-Appellants.

PARCEL TANKER, INC.,
Plaintiff,

and

BANCO DE CREDITO INDUSTRIAL, S.A.,
Plaintiff-Appellee,
v.

STOLT LUISA PANDO MT., *et al.*,
Defendants,

FELIX ACHA FERNANDEZ, *et al.*, CREWMEMBERS OF
STOLT LUISA PANDO MT.,
Intervenors-Appellants.

BANCO DE CREDITO INDUSTRIAL, S.A.,
Plaintiff-Appellee,
v.

STOLT LUISA PANDO, MT., *et al.*,
Defendants,

FELIX ACHA FERNANDEZ, *et al.*, CREWMEMBERS OF
STOLT LUISA PANDO MT.,
Intervenors-Appellants.

BANCO DE CREDITO INDUSTRIAL, S.A.,
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STOLT LUISA PANDO, MT., *et al.*,
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STOLT LUISA PANDO MT.,
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PARCEL TANKER, INC.,
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BANCO DE CREDITO INDUSTRIAL, S.A.,
Plaintiff-Appellee,

v.

STOLT LUISA PANDO, MT., *et al.*,
Defendants,

FELIX ACHA FERNANDEZ, *et al.*, CREWMEMBERS OF STOLT LUISA PANDO MT.,
Intervenors-Appellants.

Appeals from the United States District Court
for the Eastern District of Louisiana

May 14, 1993

Before DUHÉ and BARKSDALE, Circuit Judges, and HUNTER,[1] District Judge.

DUHÉ, Circuit Judge:

Two vessels subject to valid mortgages under Spanish law were seized by the mortgage-holder and sold in an American forum. Various claimants sought to intervene and share in the sale proceeds. The district court ascertained the validity of the various claims, and then ranked them. Appellants argue that the district court erred by denying preferred maritime lien status to claims for unpaid social security contributions due an agency of the Spanish government, and by denying a motion to intervene by the crewmembers of the seized vessels. We find no reversible error, and affirm.

I. *Background and Procedural History*

In July 1990, the vessels STOLT LUISA PANDO and STOLT MARIA PANDO were arrested.[2] Both vessels were owned by Maritima Antares, S.A., a Spanish corporation, and were subject to a first preferred ship mortgage held by Banco de Credito Industrial, S.A.[3] ("BCI"), another Spanish entity. These vessels were sold by judicial auction, and over $40 million was placed in the district court's registry.

Into this fray ventured Tesoreria General de la Seguridad Social de Espana ("Tesoreria General"), the Spanish Social Security administration. Tesoreria General alleged

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[1] Senior District Judge of the Western District of Louisiana, sitting by designation.

[2] The STOLT MARIA PANDO was arrested in Houston, and the STOLT LUISA PANDO was arrested in New Orleans. The proceedings were later consolidated in New Orleans.

[3] The real party in interest is Banco Exterior de Espana, S.A., the successor entity to Banco de Credito Industrial.

that Maritima Antares failed to remit to it social security contributions for the seamen employed by Maritima Antares aboard the STOLT LUSIA PANDO and the STOLT MARIA PANDO. Tesoreria General attempted to satisfy Maritima's obligation out of the sale proceeds deposited in the court's registry.

Also seeking acecss to these funds were crewmembers who had served aboard the respective ships.[4] Crewmen asserted that they were entitled to a "preferred maritime lien" for wages due them. *See* 46 U.S.C. § 31301(5)(D) (Supp.1992).[5] Preferred maritime liens "prime" or outrank a preferred ship mortgage. *Id.* at § 31326(b)(1). If the seamen's wage claim was permitted, it would take priority over BCI's vessel mortgage.

The district court allowed only partial intervention. Crewmembers were permitted to assert claims they may have against BCI for monies withheld by Maritima but not remitted to the appropriate agencies of the Spanish government. The district court, however, denied the seamen's request to assert claims against Maritima Antares and the sale proceeds. The crewmembers were given a deadline within which to file materials to support a claim against BCI. When this deadline passed without any action by the crewmembers, the court dismissed the crewmembers' intervention request in its entirety. The crewmembers now urge us to find that the district court's decision went beyond the dictates of Federal Rule Civil

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[4] The crewmembers did not seek to intervene in the action until January 1992, "on the eve of the hearing concerning substitution of security and distribution of funds—and eighteen months after the vessels were seized," *Parcel Tankers, Inc. v. M/T STOLT LUISA PANDO*, 787 F.Supp. 614, 616 (E.D.La.1992).

[5] The funds that were taken from the crew's pay, ostensibly as social security contributions but never remitted to the Spanish government, form the basis of both Appellees' claims. The seaman [sic] characterize these withheld funds as wages that are due them.

Procedure 24,[6] and that intervention against the sale proceeds should have been permitted.

The district court also held that BCI's ship mortgage was a "preferred mortgage" under 46 U.S.C. § 31301(6)(B).[7] In an attempt to prime BCI's preferred ship mortgage, Tesoreria General asserted that its claim for unpaid social security contributions was in the same preferred category and entitled to the same status as claims for crew wages. The district court concluded that the law of Spain governed the "validity and substance" of Tesoreria General's lien claim because that lien, if any, would have to be created under Spanish law. Neither party contests the application of Spanish law to this issue. Tesoreria General contends that the district court incorrectly determined that Spain does not accord lien status, similar to a claim for wages, to unpaid social security contributions.

II. *Crewmembers' Claims*

The district court held that the crewmen did not have an "interest relating to the property or transaction," as required in Rule 24, at least with regard to assessing sale proceeds held by the court. *See* Fed.R.Civ.P. 24(a)(2). It found that the crewmen assigned any wage claims they may have had against Maritima Antares to BCI by virtue

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[6] Fed.R.Civ.P. 24(a) provides:

> Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

[7] This provision extends preferred mortgage status to foreign creditors "if the mortgage, hypothecation, or similar charge was executed under the laws of the foreign country under whose laws the ownership of the vessel is documented and has been registered under those laws in a public register at the port of registry of the vessel or at a central office." 46 U.S.C. § 31301(6)(B) (Supp. 1992).

of a January 1991 Agreement negotiated between BCI and the seaman's representative, the Merchant Marine Syndicate U.G.T. ("the Union").

The *de novo* standard governs our review of the crewmens' intervention request. *See United States v. Texas Eastern Transmission Corp.*, 923 F.2d 410, 413 (5th Cir.1991); *Mothersill D.I.S.C. Corp. v. Petroleos Mexicanos, S.A.*, 831 F.2d 59, 61-62 (5th Cir.1987). Our review of the district court's interpretation of the January 1991 agreement is also *de novo*. *Shelton v. Exxon Corp.*, 921 F.2d 595, 602 (5th Cir.1991).

The crewmens' [sic] right to intervene turns on whether or not the January 1991 agreement between the Union and BCI abrogated potential wage claims the crewmen could assert against Maritima Antares. If the district court was correct in concluding that, by virtue of the January 1991 agreement, the crewmembers assigned all wage claims to BCI, the seamen do not posess the necessary interest in the controversy to support intervention of right. *See* Fed.R.Civ.P. 24(a)(2); *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 466 (5th Cir.) (en banc), *cert. denied*, 469 U.S. 1019, 105 S.Ct. 434, 83 L.Ed.2d 360 (1984).

Like the district court, we find nothing ambiguous about the January 1991 agreement. In its opening paragraph, the Merchant Marine Syndicate U.G.T. indicates that it is acting in a representative capacity on behalf of the employees of Maritima Antares, S.A. *See* Case No. 92-3100 R. vol. 1, at 74.[8] The latter provisions of the agreement clearly evince the intent of the parties:

> FIRST—That, by virtue of proceedings pursuant to the employment regulation approved by the Resolution of 12-13-90 and adopted by the Provincial Labor Directorate of Cantabria on 12-21-90, the em-

[8] *See also Parcel Tankers, Inc.*, 737 F.Supp. at 617 n. 3 (no claim that Union was without authority to act for seamen).

ployment relations of CIA, MARITIMA ANTARES, S.A. and its seamen were resolved.

SECOND—That the CIA, MARITIMA ANTARES, S.A. owes said employees, included in the aforementioned proceedings, the amount of 414,931,064 million pesetas for wages up to 12-21-90, [which figure] includes the final liquidation of its debts.

* * * *

THIRD—That BANCO DE CREDITO INDUSTRIAL, S.A. is a creditor of CIA, MARITIMA ANTARES, S.A., having secured its advances with mortgages on the following vessels belonging to the company, STOLT MARIA PANDO, STOLT LUISA PANDO. . . .

FOURTH—In that the aforementioned labor credits owed to the employees have preferred status with respect to the mortgage credits held by BANCO DE CREDITO INDUSTRIAL, S.A. in accordance with the legislation specifically controlling maritime credits [liens], said Bank is interested in acquiring the referenced credits [held by the employees] and, as the employees are in agreement, both parties do so in conformity with the following[.]

Id. at 74-75.

From the foregoing, it is evident that both parties were aware they were bringing the matter to a conclusion: the employment relations between Maritima Antares and the seamen were "resolved," and this resolution was approved by the Provincial Labor Directorate. BCA acquired the labor credits, because they "have preferred status with respect to the mortgage credits held by [BCI]. . . ." We agree with the district court that the January 1991 agreement was a "buyout" of the seamen's potential wage claims to protect the rank of the BCI mortgage. *Cf.* 46 U.S.C. § 31305 (Supp.1992) (ability of lien holder

to waive and subordinate rights). The contract conclusively shows that this was the parties' intent. "When interpreting the meaning of a contract it is the objective, and not the subjective intent of the parties which controls. When a contract is unambiguous, the instrument alone is taken to express the intent of the parties." *Swaminathan v. Swiss Air Transport Co., Ltd.*, 962 F.2d 387, 389 (5th Cir.1992); *see Shelton v. Exxon Corp.*, 921 F.2d 595, 603 (5th Cir.1991).[9]

The January 1991 agreement usurped any claim to the sale proceeds that the crewmembers might have had. Therefore, we conclude that the crewmembers have no basis to claim intervention of right. Rule 24(a)(2) provides non-parties with a means of intervening in an ongoing dispute only if the applicant has an interest relating to the property or transaction which is the subject of the action. *See Mothersill D.I.S.C. Corp.*, 831 F.2d at 61; *see also New Orleans Public Service, Inc.*, 732 F.2d at 466 ("[A] legally protected interest is required for intervention under Rule 24(a)(2), and such intervention is improper where the intervenor does not itself possess the only substantive legal right it seeks to assert in the action.").

The crewmembers argue that the district court went beyond the minimal showing of interest called for under Rule 24, and instead treated the intervention request as a motion for summary judgment on the merits of the

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[9] Though the contract is facially unambiguous, the agreement is further clarified by the circumstances surrounding its confection. The Union was aware that Maritima Antares was liable for back wages, and that BCI was very interested in pursuing a settlement of these potential claims. The Union entered into negotiations on behalf of the affected seamen, and the resulting compromise was approved by an agency of the Spanish government. BCI paid the Union $16 million for potential wage claims, an amount that was curiously close to the seamen's "preliminary estimate" of $17 million due from Maritima Antares in back wages.

crewmembers' claims. The district court, however, is not bound to blindly accept the intervention request:

> Fifth Circuit precedent establishes that "the inquiry under subsection (a)(2) is a flexible one, which focuses on the particular facts and circumstances surrounding each application. . . . [and] intervention of right must be measured by a practical rather than a technical yardstick."

United States v. Texas Eastern Transmission Corp., 923 F.2d 410, 413 (5th Cir.1991) (quoting *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 841 (5th Cir.1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976)).

The district court was correct to scrutinize the January 1991 agreement to ascertain if the crewmembers met the requirements for Rule 24(a)(2) intervention without looking at the basis for the seamen's request, as the crewmembers argue, would have necessitated further delay in the disposition of assets tied up in the court's registry.[10]

III. *Tesoreria General's Claim for Unpaid Social Security Contributions*

Tesoreria General and BCI agree that Spanish law governs the substance of Tesoreria General's claim for unpaid social security contributions. Therefore, we must evaluate whether or not Spain recognizes a maritime lien, similar to that given seamen's wage claims, for the claims

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[10] The district court discussed the possibility that the crewmembers might have had a viable claim that was independent of the claims settled in the January 1991 agreement. *See Parcel Tankers, Inc.*, 787 F.Supp. at 620. This potential claim would lie only against BCI, by virtue of a July 1990 agreement with the Union to avert labor difficulties following the arrests of Maritima Antares's vessels. *Id.* The crewmembers were granted limited intervention in the pending action to "prove up" any claims against BCI. No action was taken towards this end, and the crewmembers abandoned this claim on appeal.

Tesoreria General now asserts. After Spanish law determines its substantive nature, the law of the forum (U.S.) will rank Tesoreria General's lien claim in the pecking order of the sale proceeds distribution. *See Brandon v. S.S. DENTON*, 302 F.2d 404, 410-11 (5th Cir.1962).

We review questions regarding foreign law *de novo*. Fed.R.Civ.P. 44.1. This analysis is plenary; a circuit court "owes no deference to the district court's determination of foreign law, and may consider information not available to the district court." *Mobile Marine Sales, Ltd. v. M/V PRODROMOS*, 776 F.2d 85, 89 (3rd Cir. 1985) (citing *Kalmich v. Bruno*, 553 F.2d 549, 552 (7th Cir.1977)); *see generally* John R. Brown, "44.1 Ways to Prove Foreign Law," 9 *Mar. Law*, 179, 195 (1984).[11]

Spain's legal system is civilian in nature. Therefore, the role of positive legislation is emphasized at the expense of stare decisis. *See Henry v. S/S BERMUDA STAR*, 863 F.2d 1225, 1230-32 (5th Cir.1989). To correctly interpret Spanish law, we look first to the text of the legislation, and then to any customs which have developed with respect to its application. Finally, we can turn to judicial decisions to the extent that they fill in gaps left by law or custom. *See id.* (interpreting Panamanian law according to civilian principles).[12]

Tesoreria General advances two lines of reasoning to support its position that Spain confers preferred status on a claim for unpaid social security obligations: First, Tesoreria General contends that Spanish internal law accords unpaid wages and unpaid social security obligations

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[11] Consequently, although the district court declined to review certain affidavits submitted by the parties, we can examine the proffered materials. *See* Charles Alan Wright, Et Al., 9 *Federal Practice and Procedure* § 2444 (1971 & Supp. 1992).

[12] Our interpretation is also governed by Fed.R.Civ.P. 44.1, which permits consideration of "any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence."

parallel treatment. Second, Spain is a signatory nation to the International Convention for the Unification of Certain Rules Related to Maritime Liens and Mortgages, 100 L.N.T.S. 187, signed in Brussels in 1926, and formally ratified by Spain in 1930 ("Brussels Convention") (*reprinted in* 6A *Benedict on Admiralty* 8-17 (7th ed. 1993)). Tesoreria General asserts that this convention is broadly written, and encompasses social security contributions in the section which creates a maritime lien for crew wages. We address these arguments in reverse order.[13]

A. *1926 Brussels Convention*

Initially, it is helpful to review the applicable provisions of the 1926 Brussels Convention:

> ARTICLE 2
>
> The following give rise to a maritime lien on a vessel, on the freight for the voyage during which the claim giving rise to the lien arises, and on the accessories of the vessel and freight accrued since the commencemnt of the voyage:
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> * * * *

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[13] Tesoreria General's position on the role of Spanish internal law in this dispute has not been entirely consistent. At one point Tesoreria General argued: "It is clear that as per the decree of the Spanish Supreme Court of May 22, 1989, the Brussels Convention of 1926 is *the sole law presently applicable to the establishment of preferred maritime liens.*" Case No. 91-3922 R. vol. 5, at 1464 (Tesoreria General's Supplemental Memorandum in Opposition to BCI's Motion for Partial Summary Judgment) (emphasis added).

In its brief and argument on appeal, however, Tesoreria General has drawn a parallel between the "super privilege" accorded social security contributions under Spain's Internal laws, and the preferred status for the maritime lien it now seeks to assert. *See* Case No. 91-3922 R. vol. 6, at 1824 (Affidavit of Professor J.L. Rodriguez Carrion).

2. Claims arising out of the contract of engagement of the master, crew, and other persons hired on board[.]

* * * *

ARTICLE 3

The mortgages, hypothecations, and other charges on vessels referred to in Article 1 rank immediately after the secured claims referred to in the preceding Article.

National laws may grant a lien in respect of claims other than those referred to in the said last-mentioned Article, so, however, as not to modify the ranking of claims secured by mortgages, hypothecations, and other similar charges, or by the liens taking precedence thereof.

* * * *

PROTOCOL OF SIGNATURE

In the proceeding to the signature of the International Convention for the unification of certain rules relating to maritime liens and mortgages, the undersigned Plenipotentiaries have adopted the present Protocol, which will have the same force and the same value as if the provisions were inserted in the text of the Convention to which it relates:

I. It is understood that the legislation of each State remains free

1. to establish among the claims mentioned in no. 1 of Article 2, a definite order of priority with a view to safeguarding the interests of the Treasury; . . . .

II. There is no impairment of the provisions in the national laws of the contracting States conferring a lien upon public insurance associations in respect of claims arising out of the personnel of vessels.

It is Article 2(2)—"Claims arising out of the contract of engagement of the . . . crew"—on which Tesoreria General chiefly relies, arguing that the provision's broad scope encompasses all forms of renumeration attributable to the labor of the crew, including social security contributions withheld from a seaman's pay but not remitted to the proper governmental agency. Tesoreria General reads this provision to include social security contributions arguing that, if the drafters had intended to limit Article 2(2)'s coverage only to those sums payable directly to seamen, they would have chosen more restrictive language. Tesoreria General concludes that *any claim* for which the employer/vessel owner is liable as a result of its contract of employment with a seaman, including nonpayment of social security contributions, is a claim contemplated by Article 2(2). Semantically, then Tesoreria General equates social security contributions with wages and other forms of compensation.

BCI, unsurprisingly, takes a narrower view. It argues that Article 2(2) does not encompass social security contributions, and the Protocol of Signature's provisions make this evident because it leaves undisturbed the right of signatory countries to enact national legislation "conferring a lien upon public insurance associations in respect of claims arising out of the insurance of the personnel of vessels." BCI argues that since Protocol II anticipates that signatory nations have, or may adopt, specific legislation to create liens for public insurance contributions, any notion that the 1926 Convention itself creates such a lien is negated. We believe this view is correct.

In countries which recognize that unpaid social insurance contributions create a preferred maritime lien, specific legislation has been adopted. *See* International Maritime Organization United Nations Conference on Trade and Development, "Consideration of Maritime Liens and Mortgages and Related Subjects, in Accordance with the

Terms of Reference of the Joint Intergovernmental Group," U.N. Doc. TD/B/C.4/AC.8/6 (April 9, 1987).[14]

The JIGE IMO/UNCTAD report lists fifty-two countries and identifies the various maritime liens each recognizes by national legislation. Only twelve of those countries listed recognize a lien for social security contributions. Of the twenty-one listed countries that are also parties to the 1926 Brussels Convention, only three (Belgium, France, and Italy) recognize a lien for social security contributions. Furthermore, the explanatory appendix to the table of countries discusses "wages" and "social insurance contributions" in separate sections:

> *Wages*
>
> Wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel (article 4, paragraph 1(i) of the 1967 Convention, and of the CMI Lisbon Draft; *see also article 2, paragraph 2 of the 1926 Convention*).
>
> *Social insurance contributions*
>
> Social insurance contributions payable on behalf of the master, officers and other members of the vessels complement (article 4, paragraph 1(i) CMI Lisbon Draft).

(Emphasis added). The JIGE's report indicates that the 1967 Convention and the 1926 version indisputably pro-

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[14] This Report was written by the Joint Intergovernmental Group of Experts (JIGE) on Maritime Liens and Mortgages and Related Subjects, a cooperative comprised of representatives from the United Nations Conference on Trade and Development (UNCTAD), and the International Maritime Organization (IMO). The cited work is partially contained in the record. Case No. 91-3922 R. vol. 5, at 1582-85. However, the record did not contain the full report—an explanatory appendix was omitted. This appendix was included in the Record Excerpts presented to this Court on appeal. Per Fed.R.Civ.P. 44.1, we are able to consider this material.

vide that wage claims give rise to maritime liens. Note that the section on wages makes reference to *both* the 1926 and the 1967 Conventions. No reference to either Convention is made in the section dealing with social insurance contributions. Reference is made only to the "Lisbon Draft", and not to any Convention currently in force. We conclude that this indicates that the IMO/UNCTAD intergovernmental group of experts did not consider that social insurance contributions are entitled to a lien under either the 1926 or the 1967 Brussels Convention.

One of the main points of error raised by Tesoreria General on appeal is that the district court erred in relying on the JIGE report. The JIGE, *see supra*, note 14, was involved in harmonizing differences between the 1926 Brussels Convention and the 1967 Brussels Convention, which also dealt with the unification of rules relating to maritime liens and mortgages.[15] The 1967 Convention's position on liens for social security contributions appears to be narrower than that of its predecessor. Under the 1967 Convention, liens are granted to "wages and other sums due to the master, officers and other members of the vessels complement in respect of their employment on the vessel[.]" 1967 Brussels Convention, art. 4(1)(i) (*reprinted in* 6A *Benedict on Admiralty* 8-25 (7th ed. 1993)). The phrasing of this provision ("sums due to the master . . . ."), grants a lien only if money is owed directly to a crewmember, and not to a third party on the crewmember's behalf. *See* William Tetley, *Maritime Liens and Claims* 128-29 (1985).

The JIGE was dealing with two divergent provisions on social insurance contributions, and Tesoreria General maintains that the resulting IMO/UNCTAD report was speaking only to the narrower provisions of the 1967 Brussels Convention, of which Spain is not a party. Con-

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[15] Spain is not a party to the 1967 Brussels Convention.

sequently, Tesoreria General argues, the district court's decision was based upon inapplicable information. We conclude that the report, while discussing two different international conventions, clearly distinguishes between the two agreements.[16]

B. *French Legislation*

Our interpretation of Spanish law, vis-a-vis the 1926 Brussels Convention, is also guided by looking to the actions of other signatory nations.[17] Protocol II of the 1926 Convention preserved the right of signatory states to enact legislation regarding liens for contributions due to public insurance associations. French law is illustrative on this point, as France has adopted specific legislation on the lien status accorded social security contributions. *See* Case No. 91-3922 R. vol. 6, at 1790-91 (Affidavit of Patrick Thieffry). In fact, France has adopted the language of Article 2(2) almost verbatim.

Tesoreria General argues that by adopting the language of Article 2(2), French law demonstrates that the 1926 Convention itself creates a maritime lien for social security contributions. Tesoreria General further contends that we should infer that by assimilating the language of Article 2(2) wholesale, France's actions illustrate that a signatory country need not enact its own distinctly worded legislation conferring privileged status to a lien for unpaid social insurance contributions. We are not persuaded by this reasoning.

France has enacted specific legislation on this matter, while Spain's legislature did not address this issue until

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[16] Interestingly, although Tesoreria General paints the work of the IMO/UNCTAD group of experts in a disparaging light, the work of this group was cited favorably by Tesoreria General in their Supplemental Memorandum in Opposition to BCI's Motion for Partial Summary Judgment. *See* Case No. 91-3922 R. vol. 5, at 1476.

[17] We have been referred to no Spanish judicial decisions interpreting Article 2(2) of the 1926 Brussels Convention.

recently.[18] Whatever the wording of the French law, the simple fact that France deemed it necessary to legislatively create a lien for unpaid social security contributions illustrates that such legislative action was necessary under the terms of the 1926 Convention. We believe that this supports the conclusion that the 1926 Convention, standing on its own, does not give rise to the preferred lienholder status that Tesoreria General now seeks.

C. *Spain's Internal Legislation*

Turning to a review of Spain's internal law, Tesoreria General argues that Spain grants a "super privilege" to unpaid social security contributions, and that a Spanish court, *if* called upon to extend this privilege in a maritime context, would certainly do so. The affidavit of Professor J.L. Rodriguez Carrion was offered by Tesoreria General in support of this position. This affidavit, however, is at best inconclusive. Rodriguez Carrion has drawn an analogy between statutes according preferential treatment for social security payments and laws which provide this status for tax debts. *See* Case No. 91-3922 R. vol. 6, at 1824 (Affidavit of Professor J.L. Rodriguez Carrion). Equating delinquent tax payments with unpaid social security contributions undermines Tesoreria General's efforts to characterize its claim as equivalent to one for "wages."

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[18] The Rodriguez Carrion affidavit, discussing a recently passed Spanish statute, states: "Thanks to this new drafting, payments due to Social Security are equivalent to those taxes owed to the province or municipality . . . ." Later, the affidavit observes that "[i]t is lamentable that neither the Spanish legislature nor our Supreme Court, has spoken on the ranking of Social Security contribution credits with relation to the privileged credits of Article 2 of the Brussels Convention of 1926." *See* Case No. 91-3922 R. vol. 6, at 1824 (Affidavit of Professor J.L. Rodriguez Carrion).

IV. *Digression Into the Familiar*

When the parties have failed to conclusively establish foreign law, a court is entitled to look to its own forum's law in order to fill in any gaps. *See Cantieri Navali Riuniti v. M/V SKYPTRON*, 802 F.2d 160:

> This practice has been approved by this Circuit and by leading commentators on choice of law. In *Symonette Shipyards Ltd. v. Clark*, 365 F.2d 464, 468 (5th Cir. 1966), we noted that "[i]n the absence of sufficient proof to establish with reasonable certainty the substance of the foreign principles of law, the modern view is that the law of the forum should be applied." Professors Scoles and Hay adopt a similar view in their treatise. E. Scott and P. Hay, Conflict of Laws § 12.19 (1982) ("[I]t is better to abandon the terminology of presumption and simply say that where foreign law is not proved the court applies . . . local law.").

Id. at 163 n. 5. In the instant case we need not turn to American maritime law as a substantive device because we hold that the 1926 Brussels Convention, as the applicable law of Spain, does not create a lien (preferred or otherwise) for unpaid social security contributions. American maritime law, however, provides a background against which we can analyze Tesoreria General's attempts to characterize its claim for unpaid social security contributions as one for "wages."

Many of the American cases in which parties, other than seamen, seek to assert a "wage" lien involve employer contributions to employee benefit plans. *See, e.g., Citibank, N.A. v. M/V AMERICAN MAINE*, 865 F.2d 24, 28 (2nd Cir.1988); *West Winds, Inc. v. M/V RESOLUTE*, 720 F.2d 1097, 1100-01 (9th Cir.1983), *cert. denied*, 467 U.S. 1242, 104 S.Ct. 3513, 82 L.Ed.2d 822 (1984); *Barnouw v. S.S. OZARK*, 304 F.2d 717, 719-20 (5th Cir.), *cert. denied*, 371 U.S. 923, 83 S.Ct. 291,

9 L.Ed.2d 291 (1962) Uniformly, American courts have denied liens equivalent to the wage lien to nonseamen asserting such claims: "Every published opinion addressing employer contributions to pension-type benefit plans . . . has concluded that such contributions are not 'wages of the crew'." *Prudential Ins. v. U.S. Lines, Inc.*, 915 F2d 411, 412 (9th Cir.1990).

At the heart of these decisions is the insurmountable obstacle that Tesoreria General cannot overcome, under Spanish or American maritime law. Unpaid social insurance or pension contributions are not "wages of the crew" because they are due to a third party vicariously through the seamen's labors; the seamen themselves have no claim to their employer's contributions. *See Prudential Ins.*, 915 F.2d at 412; *M/V AMERICAN MAINE*, 865 F.2d at 28; *Long Island Tankers Corp. v. S.S. KAIMANA*, 265 F.Supp. 723, 726 (N.D.Cal1967), *aff'd*, 401 F.2d 182 (9th Cir.1968), *cert. denied*, 393 U.S. 1095, 89 S.Ct. 879, 21 L.Ed.2d 785 (1969).

The District Court of Alaska recently reiterated the cogency of this reasoning. *See Kesselring v. F/T ARCTIC HERO*, 1993 AMC 447, 1992 WL 470510 (D.Alaska 1993). In *Kesselring*, the United States Government argued that unpaid withholding taxes taken from the crew's pay created a maritime lien for crew wages in the Government's favor. The court termed this effort "bootstrapping," and held: "There is no case law or other authority supporting the proposition that crew wages encompasses uncollected taxes from monies withheld by an employer." *Id.* at 448.

Under *West Winds, Inc. v. M/V RESOLUTE*, *supra*, and *Long Island Tankers Corp. v. S.S. KAIMANA*, *supra*, if the seamen can establish a right to an immediate dispersal of benefits, or have suffered a net loss because of their employers' failure to contribute to a benefits plan, a wage lien may lie. *See West Winds, Inc. v. M/V RESOLUTE*, 720 F.2d at 1099; *Long Island Tankers*

Corp. v. S.S. KAIMANA, 265 F.Supp. at 726-27. This reasoning could extend to the instant case and might create a lien in Tesoreria General's favor if the crewmembers were personally liable for the unpaid social insurance contributions. Such is not the case here, as Spain's Social Security Law art. 68 § 2 provides that if a deduction is made but not remitted, the employer is exclusively liable for remitting the total contribution.[19]

V. *Adequate Time for Discovery*

We next address Tesoreria General's claim that the district court abused its discretion in ruling on BCI's motion for summary judgment without affording Tesoreria General adequate time for discovery. A review of the time-frame in which the events of this case transpired convinces us that the district court did not abuse its discretion.

This matter was originally in two districts—the Southern District of Texas at Houston, and the Eastern District of Louisiana at New Orleans. The cases were consolidated in the New Orleans forum in January 1991. Tesoreria General had filed its intervention request in Sep-

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[19] If the seamen were personally liable for the unpaid social security contributions, Tesoreria General may have been entitled to a lien against the sale proceeds. This reasoning comports with the IMO/UNCTAD JIGE's report on harmonizing the Brussels Conventions: "[C]ontributions due by the master and crew and deducted by the owner but not paid and which, consequently, *is claimed by the social insurance institution directly from the master and the crew*[,]" would give rise to a maritime lien against a vessel. "Revision of the International Conventions for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, Final Report of the Chairman of the International Sub-Committee," *reprinted in* Case No. 91-3922 R. vol. 5, at 1478 (Tesoreria General's Supplemental Memorandum in Opposition to BCI's Motion for Partial Summary Judgment) (emphasis added). Since Tesoreria General cannot recover funds directly from the seamen, there is no basis to impose a lien against the sale proceeds to prevent out-of-pocket losses to the crew.

tember of 1990, shortly before BCI filed its original motion for summary judgment. BCI's motion was stayed indefinitely, but BCI renewed it in February of 1991, after the cases were consolidated. A hearing was set for March 20, 1991. Tesoreria General opposed the resetting of the summary judgment hearing, claiming there was inadequate time for discovery; however, no Federal Rule Civil Procedure 56(f) affidavit, setting forth what additional discovery was necessary, accompanied Tesoreria General's opposing motion.[20] After the March 20, 1991 hearing, the district court twice requested additional briefing on the lien ranking issue. The district court issued its ruling on lien status in July 1991, and a Federal Rule Civil Procedure 58 judgment was entered on August 1, 1991.

From the time that it filed an intervention request to the March 1991 hearing on BCI's summary judgment motion, Tesoreria General had over seven months within which to conduct discovery. Granted, the outbreak of the Persian Gulf conflict during this same period made international travel inadvisable. Nevertheless, Tesoreria General, an agency of the Spanish government, was in the unique position of having access to all manner of authorities on Spanish law. Counsel should have been able to coordinate necessary discovery by telephone, facsimile transmissions, and the mails. In-person preparation, while surely preferable to alternative means, was not the only manner in which discovery could have proceeded. No such effort was apparently made.

Rule 56 contemplates that the parties will be afforded *adequate time* to conduct necessary discovery; "This is a very different animal from 'adequate discovery.'" *Union*

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[20] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986) (Rule 56(f) is appropriate mechanism to deal with premature summary judgment motion); *accord Union City Barge Line, Inc. v. Union Carbide Corp.*, 823 F.2d 129, 138 n. 21 (5th Cir.1987).

City Barge Line, Inc. v. Union Carbide Corp., 823 F.2d 129, 138 n. 21 (5th Cir.1987). No Federal Rule Civil Procedure 56(f) motions were presented to the court which could have illustrated what discovery Tesoreria General felt was necessary to refute BCI's motion for summary judgment. *See id.* at 137 (Federal Rule Civil Procedure 56(f) is "tailor-made" for such situations). The district court did not abuse its discretion in hearing BCI's motion.

VI. *Summary Judgment*

We will affirm a grant of summary judgment "where 'we are convinced, after an independent review of the record, that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.' " *Hartford Acc. & Indem. v. Costa Lines Cargo Serv.*, 903 F.2d 352, 362 (5th Cir.1990) (quoting *Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States*, 832 F.2d 1358, 1364 (5th Cir.1987)) (internal citations omitted). The necessity of shifting through foreign law does not mitigate against the use of summary proceedings:

> This conclusion seems obvious in light of Rule 44.1's mandate that such a determination "shall be treated as a ruling on a question of law." Thus, even differences of opinion on the content, applicability, or interpretation of the foreign provision may not be characterized as a "genuine issue as to any material fact" under Rule 56.

John R. Brown, "44.1 Ways to Prove Foreign Law," 9 *Mar.Law.* 179, 194 (1984).

VII. *Conclusion*

Despite the differing interpretations of Spanish law offered by the parties, we conclude that the 1926 Brussels Convention does not create a maritime lien for unpaid social security contributions. Furthermore, the district

court did not abuse its discretion in the conduct of the proceedings; adequate time for discovery was provided.

The crewmen's intervention request was properly denied. The crewmembers, through their representative Union, assigned their wage claims to BCI by virtue of the January 1991 agreement. Lacking any interest relating to the sale proceeds, which formed the basis of the present action, the crewmembers cannot intervene of right under Rule 24(a)(2).

The judgment of the district court is, therefore, AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 90-2376 c/w
90-2411, 90-2716 and 19-386

SECTION "D" (1)

PARCEL TANKERS, INC.

versus

STOLT LUISA PANDO MT, *et al.*

MINUTE ENTRY

[Date of Entry July 25, 1991]

Before the court is the Motion of Plaintiff, Banco De Credito Industrial, S.A., formerly Banco De Credito A La Construccion, S.A. ("BCI") for Partial Summary Judgment as to the ranking of the various claims asserted against the two vessels in this consolidated action. Various parties to these actions have submitted memoranda in opposition to this motion.

BCI's original Motion moved for Partial Summary Judgment as to (1) the validity of BCI's first preferred mortgage lien and (2) the ranking of the various claims asserted against the M/T STOLT LUISA PANDO. Subsequent to the filing of this motion, the action involving the M/T STOLT MARIA PANDO, originally filed in the U.S. District Court in Houston, was consolidated with the action before this court. BCI had filed a similar Motion for Summary Judgment in the Houston court which is also before this court. In an Order entered April 1,

1991, this court granted Summary Judgment in favor of BCI, and held that BCI's first preferred mortgage lien on the M/T STOLT LUISA PANDO and M/T STOLT MARIA PANDO were "preferred mortgages" as provided in 46 U.S.C. § 31301(6)(B). Thus, the question remaining before this court is whether the issue of the ranking of the various claims asserted against the two vessels is ripe for summary judgment.

Rule 56 of the Federal Rules of Civil of [sic] Procedure states that when no issue of material fact exists and movers are entitled to judgment as a matter of law, summary judgment may be granted. Fed. R. Civ. P. 56. The standard followed is not whether "a mere existence of [an] alleged factual dispute [exists]," but whether a material fact defined by substantive law that will affect the outcome of the suit is in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). No issue will be considered to exist however unless sufficient evidence is presented in favor of the non-moving party on which a jury could return a verdict for it. *Id.* Therefore, sufficient evidence supporting the claimed factual dispute must be shown, and the non-moving party must set forth specific facts to claim there is an issue for trial. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968). If the evidence is merely colorable or not significantly probative, summary judgment may be granted.

The parties opposed to BCI's motion have not alleged any substantive issues of fact. They merely allege that the motion is premature because additional discovery as to the facts and the controlling law is needed. The Fifth Circuit has held that "the complaining party is required to do something more than state that discovery might reveal something of which [it was] not aware." *Hartford Accident & Indemnity Co. v. Costa Lines Cargo Services, Inc.*, 903 F.2d 352 (5th Cir. 1990) (citations omitted). The parties to this action have been given numerous opportunities and extensions of time in which to conduct

additional discovery and present additional briefs as to the applicable law. Even after conducting substantial discovery, the parties have presented no substantive factual disputes and the controlling law is clear to this court, thus, the dispute between the parties is a question of law for the court to decide.

These consolidated cases involve the arrest of two vessels pursuant to actions brought in a United States District Court to enforce a Spanish preferred ship mortgage. Various claimants have intervened in both cases to assert claims allegedly arising from transactions taking place in the United States, Spain, Portugal, the Netherlands, and other foreign jurisdictions. (Although various claims have been filed, the court limits its analysis to the claims of Tesoreria General de la Seguridad Social de Espana ("Tesoreria General") and Kopcke Holland B.V. ("Kopcke") as they are the only intervenors who claim that their lien primes that of BCI.) In determining the proper ranking of the various liens asserted against the vessels the court is faced with two issues: (1) what law is applicable in ranking the liens, and (2) what law is applicable to determine the validity and the classification of the various liens.

The first issue the court must address is what law is applicable in determining the proper ranking of the liens —the law of Spain or the law of the United States. The court recognizes that the general rule in determining the validity of the mortgage is to look to the law of the country where the mortgage was contracted. However, in ranking liens, the Fifth Circuit has held that the court must use the law of the country where the seizure took place. In *Brandon v. Denton*, 302 F.2d 404 (1962), the court recognized the rule established by Judge Brown in *The Scotia*:

> Liens and privileges, when enforced in other countries than in those by whose laws they are created, are largely treated as remedies; and, unless affecting

> foreigners alone, take rank according to the law of the forum.

The Scotia, 280 F. 927 (S.D.N.Y. 1888). The court also looked to the earlier case of *Harrison v. Sterry*, 9 U.S. (5 Cranch) 289 (1809), in which Chief Justice Marshall stated the following rule:

> The law of the place where a contract is made is, generally speaking, the law of the contract, i.e., it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is intrinsic, and is rather a personal privilege, dependent on the law of the place where the property lies, and where the court sits which is to decide the case.

Harrison, 9 U.S. at 298. The Fifth Circuit held that this general rule also applies in a maritime context, and that the validity of a maritime lien is considered in light of the law of the place where the lien arose, while ranking is determined by the law of the forum. *Morgan Guaranty Trust Co. v. M/V GRIGORIOS C. IV*, 615 F. Supp. 1444, 1454 (E.D. La. 1985), citing *Brandon*, 302 F.2d at 411. This principle is well recognized in the United States. *See* Tetley, *Maritime Liens and Claims*, at 531 (1985); G. Gilmore and C. Black, *The Law of Admiralty*, at 701 (2d ed. 1975).

The court recognizes that in the jurisprudence holding that United States law is applicable when determining the ranking of liens against a vessel seized in the United States, regardless of the nationality of the vessel and the various claims against it, a claim by an American interest was always present. These cases generally arose when an American interest seized a vessel, foreign interests intervened, and the court was required to determine what law was applicable for determining the ranking of the various claims. The present case differs from this jurisprudence in that a Spanish interest seized the vessel and various interests, foreign and American, intervened. The Ameri-

can interests that intervened are relatively insignificant in amount compared to the claims of BCI and Tesoreria General, but the court finds that these interest [sic] combined with the claim of the U.S. Marshal's office dictate that United States law be applied in determining the ranking of the claims asserted against the vessel.

The second issue the court will address is what law is applicable to determine the validity and the substantive status of the various liens. The lien that this court is primarily concerned with is the lien asserted by Tesoreria General for sums owed by the owner of the vessels to the Tesoreria General, a division of the Spanish Social Security System, pursuant to Spanish law. The court must decide whether the lien asserted by Tesoreria General is included in the same preferred category and enjoys the same substantive status as claims for crew wages.

Under a conflict of law analysis, the validity and substantive status of a maritime lien is considered in light of the law of the place where the lien arose. *Morgan Guaranty Trust Co. v. M/V GRIGORIOS C. IV*, 615 F. Supp. 1444, 1454 (E.D. La. 1985); *Brandon v. Denton*, 302 F.2d 404 (5th Cir. 1962). The lien asserted by Tesoreria General was created under Spanish law; thus, the court must decide whether Spanish law holds that a claim for social security contributions gives rise to a preferred maritime lien, similar to a claim for crew wages, that would prime the lien of BCI. If Spanish law recognizes Tesoreria General's claim as giving rise to a preferred maritime lien of the same substantive status as crew wages, then U.S. courts are bound to recognize it as such and must rank the lien according to this characterization.

After reviewing the conflicting statements of the experts of BCI and Tesoreria, and the reports of the Comite Maritime International and the Joint UNCTAD/IMO Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects, the court concludes that

neither the Brussels Convention of 1926, of which Spain is a signatory, nor the law of Spain confer a preferred maritime lien, similar to a claim for wages, to the claims of Tesoreria General. In reaching its conclusions, the court disregarded the conflicting affidavits of Sr. Ruiz, Sr. Vinal and Sr. Alcaraz because of the lack of supporting documentation for their opinions. The court was convinced by the reports mentioned above that although consideration is being given to future amendments of the 1926 and 1967 Brussels Conventions which would allow claims for social insurance contributions to assert a maritime lien in the same category as a claim for wages, the 1926 Brussels Convention as presently worded does not recognize Tesoreria General's claim as a preferred maritime lien against the vessels. The allegations of the experts that Spain may or may not agree to a future amendment of the Convention is of no significance.

The court further finds that the claims by Kopcke would not have priority over the claims of BCI. Even assuming Kopcke's claim would meet the criteria of "necessaries" under 46 U.S.C. § 31301, it would not meet the criteria of a "preferred maritime lien" since it arose after BCI's preferred mortgage, and the necessaries in question were provided outside the United States. *See* 46 U.S.C. § 31301(5)(A) and 46 U.S.C. § 31326(b)(2). The only claims that this court finds have priority over the claims of BCI are: (1) the custodia legis expenses—to include the expenses of the U.S. Marshal's office in arresting, storing and selling both vessels, and the claims of SAAB for necessaries supplied to the M/V STOLT MARIA PANDO after arrest of the vessel, and (2) the claims of Gulf Maritime—the U.S. supplier who supplied necessaries to the M/V STOLT MARIA PANDO while docked in Houston in March 1990. BCI's first preferred mortgage lien on the vessels has priority over all other claims asserted by the intervenors; thus, the court finds the ranking of these claims is unnecessary.

The court further orders that counsel for BCI submit a proposed judgment to the court no later than Wednesday, July 31, 1991.

* * * *

/s/ J. McNamara

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 90-2376 c/w 90-2411,
90-2716, and 91-386

SECTION "D" (1)

PARCEL TANKERS, INC.

versus

STOLT LUISA PANDO MT. *et al.*

JUDGMENT

[Date of Entry August 1, 1991]

Considering the motion of plaintiff, Banco de Credito Industrial, S.A., formerly Banco de Credito a la Construccion, S.A. ("BCI"), for partial summary judgment as to (1) the validity of BCI's first preferred mortgage lien on the M/T STOLT LUISA PANDO and M/T STOLT MARIA PANDO, and (2) the ranking of the various claims asserted against the vessels in this consolidated action (except the cargo claims of Woodhouse, Drake & Carey, Ltd., et al.), the memoranda and supplemental memoranda filed by the parties herein, the documentary evidence before the Court, and after having heard argument from counsel at the hearing held on March 20, 1991, and considering the Court's Order of April 1, 1991 and Minute Entry of July 25, 1991.

IT IS HEREBY ADJUDGED, ORDERED AND DECREED that plaintiff's motion for summary judgment is

GRANTED and BCI's first preferred mortgage lien on the M/T STOLT LUISA PANDO and M/T STOLT MARIA PANDO are held to be "preferred mortgages" as provided in 46 U.S.C. § 31301(6)(B).

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that the only claims having priority over BCI's first preferred mortgage lien on the M/T STOLT LUISA PANDO and M/T STOLT MARIA PANDO are: (1) the custodia legis expenses—to include the expenses of the U.S. Marshal's office in arresting, storing and selling both vessels, and the claim of Saab Tank Control, a division of Saab Systems, Inc., for necessaries supplied to the M/T STOLT MARIA PANDO at Houston after arrest of the vessel, and (2) the claim of Gulf Maritime Services, Inc.—the U.S. supplier which supplied necessaries to the M/T STOLT MARIA PANDO while docked at Houston in March 1990.

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that BCI's first preferred mortgage lien on the M/T STOLT LUISA PANDO and M/T STOLT MARIA PANDO have priority over all other claims asserted by the intervenors; thus, the Court finds the ranking of these claims is unnecessary. However, the Court does not rule on the ranking of the cargo claims of Woodhouse, Drake & Carey, Ltd., et al. against the M/T STOLT LUISA PANDO and M/T STOLT MARIA PANDO inasmuch as their ranking was not requested in plaintiff's motion for partial summary judgment.

New Orleans, Louisiana, this 31 day of July, 1991.

/s/ J. McNamara
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 90-2376 c/w
90-2411, 90-2716 and 91-386

SECTION "D" (1)

PARCEL TANKERS, INC., *et al.*

versus

M/T STOLT LUISA PANDO, *et al.*

MINUTE ENTRY

[Date of Entry September 30, 1991]

Before the court is Tesoreria General de la Seguridad Social's Motion for New Trial and/or to Alter or Amend Summary Judgment, which is opposed by Banco de Credito Industrial, S.A. The motion is before the court on briefs, without oral argument.

After due consideration of the memoranda of counsel and the applicable law, IT IS ORDERED that the Motion for New Trial and/or to Alter or Amend Summary Judgment is hereby DENIED.

* * * *

/s/ J. McNamara

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3922
C/W 92-3100 & 92-3298

BANCO DE CREDITO INDUSTRIAL, SA,
Plaintiff-Appellee,

versus

TESORERIA GENERAL DE LA,
Intervenor-Appellant,

versus

STOLT LUISA PANDO, MT,
Defendants.

PARCEL TANKER, INC.,
Plaintiff,

and

BANCO DE CREDITO INDUSTRIAL, SA,
Plaintiff-Appellee,

versus

TESORERIA GENERAL DE LA,
Intervenor-Appellant,

versus

STOLT LUISA PANDO MT., *et al.*,
Defendants.

WOODHOUSE DRAKE & CARRY, LTD.,
Plaintiff,

and

BANCO DE CREDITO INDUSTRIAL, SA,
Plaintiff-Appellee,

versus

TESORERIA GENERAL DE LA,
Intervenor-Appellant,

STOLT LUISA PANDO MT.,
Defendant.

BANCO DE CREDITO INDUSTRIAL, SA,
Plaintiff-Appellee,

versus

TESORERIA GENERAL DE LA,
Intervenor-Appellant,

versus

M/T STOLT MARIA PANDO, *in rem, et al.,*
Defendants.

Appeals from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(July 19, 1993)

Before DUHÉ and BARKSDALE, Circuit Judges, and HUNTER,* District Judge.

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* Senior District Judge of the Western District of Louisiana, sitting by designation.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ John M. Duhé, Jr.
United States Circuit Judge

APPENDIX F

TRANSLATION

MINISTRY OF TRANSPORTATION,
TOURISM AND COMMUNICATIONS

GENERAL OFFICE OF THE MERCHANT MARINE

In answer to your fax of March 21, 1991, I am pleased to report the following aspects:

FIRST

Spain is a signatory of the Brussels Convention of 1926, ratified on June 2, 1930 (Official Gazzete No. 212 of July 31).

SECOND

The position of the Spanish Administration, in accordance with International Conventions and the law in force, defends the need of maintaining the primacy of the social interest upon economic interests. In this regard the contributions to the Spanish Sequridad Social System have to have privileged credit nature since they directly affect future benefit payments of the workers and affect their legitimate rights with preference over other credits that might exist, namely the bank credits, in this case the credits that Banco de Credito Industrial might have.

THIRD

Moreover, the questionnaire from which it is shown that Spain shows its refusal to include among the maritime privilege the Sequridad Social's quotas, cannot be taken into account as the official position of The Spanish Administration, since it is a document issued by The International Maritime Committee, an organization that, despite its known reputation, is private in nature and to

which Spain is a member through The Spanish Maritime Association, also private in nature, and whose decisions and proposals never prejudice the political positions that our country might have in international forums.

This official announcement, which has an urgent character, can be extended if you request so, in order to appreciate the controversy at issue in its just measure.

Respectfully,

Signed:

Jose Antonio Cruz Ruiz

Certification of the Translation

I hereby certify that this is a true and accurate translation of the original document in Spanish.

/s/ Ileana Arias
ILEANA ARIAS
Attorney at Law

SWORN TO AND SUBSCRIBED BEFORE ME THIS 22nd DAY OF MARCH, 1991.

/s/ Mark Gundlach
Notary Public

[SEAL]

MINISTERIO DE TRANSPORTES,
TURISMO Y COMUNICACIONES

DIRECCION GENERAL DE LA MARINA MERCANTE

EN CONTESTACION A SU TELECOPIA DE 21 DE MARZO DE 1991 ME COMPLACE COMUNICARLE LAS SIGUIENTES PUNTUALIZACIONES:

PRIMERA.

ESPAÑA ES SIGNATARIA DE LA CONVENCION DE BRUSELAS DE 1926. RATIFICADA EL 2—DE JUNIO DE 1930 (CACETA N. 212 DE 31 DE JULIO).

SEGUNDA.

LA POSICION DE LA ADMINISTRACION ESPAÑOLA EN CUMPLIMIENTO DE LOS CONVENIOS INTERNACIONALES Y DE LA LEGISLACION VIGENTE DEFIENDE LA NECESIDAD DE MANTENER LA PRIMACIA DE LOS INTERESES SOCIALES SOBRE LOS ECONOMICOS. EN ESTEORDEN DE IDEAS, DEBEN TENER EL CARACTER DE CREDITOS PRIVILEGADOS LAS COTIZACIONES A LA SEGURIDAD SOCIAL ESPAÑOLA YA QUE AFECTAN DIRECTAMENTE A PRESTACIONES FUTURAS DE LOS TRABAJADORES E INCIDEN EN SUS LECITIMOS DERECHOSCON PREFERENCIA EN LA PRELACION DE OTROS CREDITOS QUE PUDIERAN EXISTIR,—SEÑALADAMENTE LOS BANCARLOS EN ESTE CASO LOS CREDITOS QUE PUDIERA TENER EL BANCO DE CREDITO INDUSTRIAL.

TERCERA.

A MAYOR ABUNDAMIENTO, EL CUESTIONARIO EN EL QUE SE RECOCE QUE ESPAÑA MUESTRA SU NEGATIVA A QUE SE INCLUYAN ENTRE LOS

PRIVILEGIOS MARITIMOS LAS CUOTAS A—LA SEGURIDAD SOCIAL, NO PUEDE SER TENIDO EN CUENTA COMO POSTURA OFICIAL DE—LA ADMINISTRACION ESPAÑOLA, YA QUE SE TRATA DE UN DOCUMENTO ELABORADO POR EL COMITE MARITIMO INTERNACIONAL, ORCANISMO QUE AUNQUE DE RECONOCIDO PRESTIGIO, ES DE CARACTER PRIVADO Y EN EL QUE ESPAÑA ESTA PRESENTE A TRAVES DE LA ASOCIACION ESPAÑOLA DE DERECHO MARITIMO TAMBIEN DE CARACTER PRIVADO, Y CUYAS DE CIONES Y PROPUESTAS EN NINGUN CASO PREJUZGAN LAS POSICIONES POLITICAS QUE—NUESTRO PAIS PUDIERA MANTENER EN FOROS INTERNACIONALES.

EL PRESENTE COMUNICADO QUE TIENE CARACTER DE URGENCIA PUDIERA AMPLIARSE SI VDS. LO SOLICITARON A LOS EFECTOS DE APRECIAR LA CONTROVERSIA PLANTEADA EN SU JUSTA MEDIDA.

ATENTAMENTE.

/s/ Jose Antonio Cruz Ruiz
JOSE ANTIONIO CRUZ RUIZ

APPENDIX G

TRANSLATION

Ministry of
Public Works and Transportation
Office of the General Secretary of Transportation Services

GENERAL DIRECTORATE OF THE MERCHANT MARINE

Re: Banco de Credito Industrial, S.A. v.
M/T STOLT LUISA PANDO

SUBJECT: 1926 Brussels Conventions on Maritime Liens And Mortgages

In reference to the question raised with respect to whether the social security contributions are included in the concept of credits of Article 2.2 of the 1926 Brussels Convention, this General Directorate affirms that its interpretation since the named Convention came into force was that the contributions are included.

The 1926 Brussels Conventions is a part of our legal system and is of direct application as an internal law once published in the State's Official Bulletin which means that it is not necessary to promulgate any other rule of law for its incorporation or development.

The express mention of the social security contribution as a maritime credit giving rise to a lien, in Article 4.1(1) of the Convention on Maritime Liens and Mortgages adopted in Geneva at the beginning of May of 1993, should not be interpreted as implying that the prior Brussels Convention of 1926 did not incorporate the social security contributions as a maritime credit giving rise to a lien.

In the debates that were held in the Joint Intergovernmental Group UNCTAD/OMI, during the preparatory

meetings of the project of convention recently adopted, the delegations agreed with the aforementioned interpretation. This is so given that there were statements of several delegations to the effect that they did not consider necessary such express reference to social security contributions, since the reference to salaries and other amounts owed to the Captain and crew was sufficient, which means that the payment of social security contributions qualifies as *other amounts owed* to the Captain and crew; however, it was decided to leave the reference to social security contributions explicit in order to clear any doubts that could originate (See paragraph 20 of document JIGE (II)/3 ATTACHED to the REPORT corresponding to the second set of sessions of the Joint Intergovernmental Group of Experts on Maritime liens, Maneuvers and Mortgages that took place in London between May 11 and 15, 1987).

Spain's support of this interpretation is evident, as it is Article 2.2 of the Brussels Convention of 1926, as an example of the wide interpretation of the text we cite the debates had in Geneva during the celebration in 1993 of the Diplomatic Conference where Spain proposed an express inclusion of the dismissal indemnifications to which the crew would be entitled, the same not being accepted because the different delegations that were present understood that the doubts raised by [not] including these indemnifications for discharge were inferior to [those of] the Social Security so as to include it with an express reference, given that too many express references have a contrary effect to that desired because anything not expressed would have to be understood as not included.

Madrid, June 12, 1993

The General Director

[signed] Raphael Lobeto Lobo

APPENDIX H

SWORN STATEMENT

JOSE LUIS RODRIGUEZ CARRION

1. I was born on February 10, 1936. In March, 1961, I obtained my license as an officer of the Spanish Merchant Marine and in July, 1968, I was granted my masters license; I sailed non-interrupted, from 1958 through 1977, as a Steward, Third, Second, First Officer and Captain, on vessels of Ghana, Israel and Holland flags. I obtained a degree in law from the University of Granada in 1978. In 1979, I became a professor of admiralty law at the University of Cadiz, obtaining the degree of Doctor in Commercial Law from the Autonomous University of Barcelona in 1989. I am a practicing attorney in admiralty law since 1979. I have given many conferences and seminars and I have written many articles concerning different issues on admiralty law. I am the author of the article, "Revision of the International Conventions on Maritime Liens and Mortgages, and Vessel Attachment," and "Fraud in Marine Mortgages and Liens."

Currently, I am preparing a book on marine insurance and another on the new Salvage Agreement of 1989. I am Spain's representative before the United Nations (I.M.O. and U.N.C.T.A.D) and I have attended many of their conferences on maritime issues I have just received the "First Prize of the Spanish Magazine of Insurance," for an investigative paper on marine insurance.

2. The firm CHAFFE, McCALL, PHILLIPS, TOLER & SARPY, of New Orleans, has requested a legal opinion with relation to the ranking of credits for unpaid contributions Social Security of Spain, regarding whether the Social Security credits can be considered to be included in Section 2 of Article 2 of the Brussels Convention of 1926. "for the unification of certain rules related to mortgages and maritime liens", just as was previously pre-

sented the Court by the Director General of the Merchant Marine.

3. My opinion is totally objective and I do not consider myself related to any person or entity of any kind, nor have I been requested to orient my opinion in any determined way. This opinion is based on my participation as a Spanish representative in the meetings of I.M.O.—U.N.C.T.A.D., and the knowledge that I have derived from them, and my expertise with respect to this issue.

4. A decision of this legal opinion requires that I address description of four different sections, referred to:

A. A study of the evolution of the ranking of credits for *salaries* under Spanish internal law.

B. A study of the evolution of the ranking of *Social Security contributions* under Spanish internal law.

C. Inclusion of credits for Social Security contributions under Section 2 of Article 2 of the Brussels Convention of 1926.

D. Conclusions.

5. My legal opinion.

A. *The study of the evolution of the ranking of credits for "salaries" under the Spanish internal maritime law.*

Before the dispositions of the Brussels Convention of 1926 were in force, as a result of the enactment of the Constitution of 1978, the order of ranking of the credits privileged as salaries was found in Article 580 of the Commercial Code of 1885 (applicable where there is no mortgage), and in Article 31 of the Ship Mortgage Law, of 1893, and in Article 32 of the Workers Statute, as follows:

Non-Mortgaged Vessel

Article 580 Code of Commerce.

"In every judicial sale of a vessel to pay creditors, the following will rank according to the following order:

1. Credits in favor of the public treasury supported by official certification from the competent authority.

2. Court costs of the judicial procedure, as taxed approved by the judge or the Court.

3. The salaries of the depositaries and the custodians of the vessel and any other costs or expenditures incurred in its conservation since the vessel enters the port until it is sold, which arise or are due by virtue of a justified account approved by the judge or Court.

4. The rent of the warehouse where the tackle and riggings of the ship were kept, pursuant to the contract.

5. "*Salaries owed to the Captain and crewmembers for the last voyage . . .*" (Exhibit 1)

Mortgaged vessel

Preferred credits, even though they do not appear registered in the Mercantile Registry (Article 31 of the Ship Mortgage Law)

"[The following] outrank a ship mortgage, without need that they be inscribed or noted in the Commercial Registry:

1. Taxes or contributions in favor of the State, of the Province or Municipality that were generated by the ship in its last voyage or during the immediate preceding year.

2. The rights of pilotage, tonnage and the rest and others of ports and *the salaries owed to the Captain and crewmembers,* and those *rights and salaries in the last voyage of the vessel.* (Exhibit 2).

The phrase *last voyage of the vessel* appears in both statutes. We must keep in mind that going back to the

classical time of the Code of 1885 and previous ones from where the expression arises, each voyage of a vessel (normally a round-trip), meant a different endeavor that was created for that purpose and it was economically liquidated at the end of the venture. This phrase has lost its original meaning, and its current interpretation by all therefore is that salaries owed are not limited to the last voyage.

Article 32 of the Workers' Statute (Law No. 8/1980 of March 10, B.O.E. number 64 of March 14, 1980), under section "salary guarantees," states:

> "1. The credits for salaries for the last 30 days of work, if its amount does not exceed two times the minimum interprofessional salary, will have preference above any other credit, even though it be guaranteed by mortgage or pledge . . ." (Exhibit 3).

From the above-cited statutes, we can note that the salary credits have beneficially developed in Spanish law and some of them have taken first place in the ranking list of credits, and the rest are in very privileged positions and always above any constituted mortgages.

B. *Study of the evolution of the ranking of Social Security contributions under Spanish internal law.*

Contributions owed to the Social Security have gained increasingly greater preferential status, since its beginnings with the law of July 17, 1958 (R. 1259), which set forth the preference and priority of credits for the last year's contribution to Social Security, over credits that, without special privilege, appear in public records, but lower ranking with respect to the credits in favor of the province or municipality for taxes of the last due annuity. (Article 1924, section 3, class 1 and article 1924, section 1 of the Civil Code). (Exhibit 4)

The maximum level of preference with respect to unpaid contributions to Social Security is achieved through

the enactment of law 4/90 of July 29, regarding the State Budget, which, in its Ninth Additional Disposition, changed the contents of Article 15 of law 40/80 of July 5, establishing the new text as follows:

> "1. Social Security credit contributions and joint collection concepts or if applicable, the surcharge or interest on them, will enjoy, with respect to the totality of same, the same order of preference as the credits referred to in Article 1924 of the Civil Code, Section 1 (D) of Section 1 of Article 913 of the Commercial Code.
>
> The other credits of Social Security will enjoy the same order of preference established in Section 2 (E) of Article 1924 of the Civil Code and in Section 1 (D) of Article 913 of the Commercial Code. . . ."

Thanks to this new drafting, *payments due to Social Security are equivalent to those taxes owed to the province or municipality, corresponding to the last new annuity that was not paid.* (Exhibit 5).

Taking into consideration the above-mentioned, along with Article 31, Section 1 of the Ship Mortgage Law (stated in paragraph A above), and in light of the correlation of credits for Social Security contribution not paid to tax debts, it can be affirmatively concluded that under *Spanish internal law, credits for contributions not paid to Social Security enjoy a privileged ranking over credits guaranteed by the mortgage on the vessel.* We are dealing with a "super privilege."

C. *Possible inclusion of the credits for Social Security contributions in Section 2 of Article 2 of the Brussels Convention of 1926.*

It is lamentable that neither the Spanish legislature nor our Supreme Court, has spoken on the ranking of Social Security contribution credits with relation to the privi-

leged credits of Article 2 of the Brussels Convention of 1926. Nonetheless, and due to the very privileged category that said credit enjoys in Spanish internal law, it is certain that, if the present controversy arises before the Spanish court, the court would have no choice but to decide between:

1. Lowering the ranking of the credit corresponding to Social Security contributions, granting it a position much inferior to the mortgage credit, or

2. Granting to the credit corresponding to Social Security contributions in the Convention of 1926 the very privileged place that it has within Spanish internal legislation.

In the *first case*, it is absolutely impossible that a credit of such an eminent social character, be lowered by a Spanish court. On the contrary, the principle, in case there was any doubt, is to protect the social issue, with preference over any other economical-commercial interest, and therefore the Court would throw out this option.

In the *second case*, the Court could be faced "ab initio" with the difficulty of where "to pigeonhole" such credits that do not appear to be in the Convention of 1926. Nevertheless, a second reading of Section 2 of said Convention would give the Court the solution that it would grasp immediately, since the expression of the cited article is very broad. It states as follows:

> "The credits resulting from the Captain's contract of service . . . ,"

which can encompass, without the least bit of difficulty, not only the salaries, but any other credit which is a *consequence of the Captain's contract and of other crew-members*, precisely such as the contributions to Social Security.

Moreover, if we compare the wording of Section 2 of Article 2 of the Brussels Convention of 1926, with that of Article 580, Section 6 of the Commercial Code:

"The *salaries* owed to the Captain and crewmembers. . . ,"

and with Article 31, Section 2 of the Ship Mortgage Law of 1893:

". . . and the *salaries* owed to the Captain and crewmembers. . .",

it is evident that we cannot equate the expression *salary* with that of *credits resulting from the contract of service,* since they are radically different. "Salaries" represent a species of the genus "credits resulting from the service contract". "Salaries" is a narrow concept. "Credits resulting from the service contract" is a broad concept, expansive and encompassing.

In the sense just mentioned, the most respected author in admiralty law of Spain RUIZ SOROA states:

2) "Credits resulting from the service contract of the Captain, of the crewmembers and of other persons serving onboard" are the 'labor credits' in the broadest sense of this concept, by far superior to that of 'salary credits' as known in the Spanish social legislation of matters of ranking (Article 32, Worker's Statute) . . .". (Vide Ruiz Soroa, J.M., *Maritime Law Manual: the vessel, the seaman, auxiliary personnel,* Basque Institute of Public Administration, ONETI, 1990, pp. 66 and 67), (Exhibit 6).

The undersigned professor has attended the last and conclusive session of the "Intergovernmental mixed group OMI-UNCTAD of Experts on Maritime Liens and Ship Mortgages and Related Issues" in London as Spain's representative (Exhibit 7), and I must manifest that the instructions received from the Spanish State, set forth by the ministry of Public Work and Transportation, through the Director General of the Merchant Marine (the only competent entity in the matter), was to include the contributions to the Social Security in Section 1 of Article 4 of

the new Convention project, identical to that set out by the United States of America, published in document LEG MLM/23, dated June 21, 1989 (Exhibit 8), backed by my representation. The position of Spain is, due to historic legislative reasons, identical to that maintained by France, whose courts have decisions interpreting Section 2 of Article 2 in this same way. A Spanish court would look favorably on such decisions. Furthermore, the Spanish administrative authorities insisted to me as well, in the *necessity of maintaining the privileged character of the credit corresponding to the Social Security contributions, with a preference to any other credit of economic character, whether of a mortgage or not.*

For these same reasons and instructions regarding the amendment of Article 4 of the Convention of 1967, with the purpose of clarifying the same, which in its original wording was narrower than Section 2 of Article 2 of the Convention of 1926 (*salary* v. *credit*), and based on the analysis set forth herein, it is evident that the *official* Spanish position which would be followed by a Spanish court would be that contributions to the Social Security undoubtedly enjoy a ranking above a ship mortgage, and that said contributions are included within the concept of *credits* as set forth in Section 2 of Article 2 of the Brussels Convention of 1926.

I have analyzed numerous documents (declarations and reports in favor and against, and other documents) in the case of "Banco de Credito Industrial, S.A. v. M/T STOLT LUISA PANDO, Civil Action No. 90-2411."

I would like to emphasize that in view of the cited documents and in light of what I express in this legal opinion that the position of Banco de Credito Industrial, S.A., as well as the opinion of the court of August 1, 1991 is *incorrect*, since Spain presently clearly recognizes that the contributions owed to the Social Security have the character of *salary* and *credit* within Section 2 of Article 2 of the Brussels Convention of 1926.

D. *Conclusions.*

1. Credits for *salaries* constitute a "superprivilege" under Spanish internal maritime law, totally outranking mortgage credits on the vessel.

2. Credits for the contribution to the Social Security have risen in status with respect to the ranking of the privileged credits in the internal Spanish law since 1958, when they were subordinated to the mortgage credits, until 1990 when they reach the first place in the ranking of credits, totally outranking the vessel mortgage credit.

3. The official position of Spain, expressed in the IMO-UNCTAD meetings attended by the undersigned Spanish representative is that the contributions to the Social Security outrank maritime mortgages generally, and are specifically included within Section 2 of Article 2 of the Brussels Convention of 1926.

4. If a Spanish judge were to resolve the present issue of the ranking of credits for un-paid Social Security contributions in relation to the applicability of the Brussels Convention of 1926, he would no doubt include such credits within the meaning of the expression "credits resulting from the service contract of the Captain and the crewmembers," as stated in Section 2 of Article 2 of the cited Convention.

5. The position of the competent Spanish administration is conclusive, inflexible, and repeated, in maintaining the character of "superprivilege" for the Social Security credit, in harmony with giving preference to protecting such credit over any other privilege of economic character."

Professor Dr. J.L. Rodriguez Carrion

APPENDIX I

CONSULADO GENERAL DE ESPAÑA

THE CONSUL GENERAL OF SPAIN IN THE CITY OF NEW ORLEANS AND HIS JURISDICTION.

CERTIFIES: That Mr. Rafael Lobcto Lobo is, since January 20, 1989, the Director General of the Merchant Marine. The Director General of the Merchant Marine is the highest official responsible for the Spanish Merchant Marine under the Minister of Public Works and Transport.

Therefore, his declaration of June 10, 1993, relative to the interpretation of the 1926 Brussels Convention on Privileges and Ship Mortgages represents the official position of the highest Spanish Authority in the matter.

Issued in New Orleans, Louisiana, on this first day of July, 1993.

[SEAL]

The Consul General of Spain

/s/ Pablo Sánchez-Terán
PABLO SANCHEZ-TERAN

APPENDIX J

INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES OF LAW RELATING TO MARITIME LIENS AND MORTGAGES, BRUSSELS, APRIL 10, 1926

Article 1

Mortgages, hypothecations, and other similar charges upon vessels, duly effected in accordance with the law of the Contracting State to which the vessel belongs, and registered in a public register either at the port of the vessel's registry or at a central office, shall be regarded as valid and respected in all the other contracting countries.

Article 2

The following give rise to maritime liens on a vessel, on the freight for the voyage during which the claim giving rise to the lien arises, and on the accessories of the vessel and freight accrued since the commencement of the voyage:

(1) Law costs due to the State, and expenses incurred in the common interest of the creditors in order to preserve the vessel or to procure its sale and the distribution of the proceeds of sale; tonnage dues, light or harbour dues, and other public taxes and charges of the same character; pilotage dues; the cost of watching and preservation from the time of the entry of the vessel into the last port.

(2) Claims arising out of the contract of engagement of the master, crew, and other persons hired on board.

(3) Remuneration for assistance and salvage, and the contribution of the vessel in general average;

(4) Indemnities for collision or other accidents of navigation, as also for damage caused to works forming part of harbours, docks, and navigable ways; indemnities

for personal injury to passengers or crew; indemnities for loss of or damage to cargo or baggage;

(5) Claims resulting from contracts entered into or acts done by the master, acting within the scope of his authority, away from the vessel's home port, where such contracts or acts are necessary for the preservation of the vessel or the continuation of its voyage, whether the master is or is not at the same time owner of the vessel, and whether the claim is his own or that of ship-chandlers, repairers, lenders, or other contractual creditors.

Article 3

The mortgages, hypothecations, and other charges on vessels referred to in Article 1 rank immediately after the secured claims referred to in the preceding article.

National laws may grant a lien in respect of claims other than those referred to in the said last-mentioned article, so, however, as not to modify the ranking of claims secured by mortgages, hypothecations, and other similar charges, or by the liens taking precedence thereof.

Article 4

The accessories of the vessel and the freight mentioned in Article 2, mean:

(1) Compensation due to the owner for material damage sustained by the vessel and not repaired, or for loss of freight;

(2) General average contributions due to the owner, in respect of material damage sustained by the vessel and not repaired, or in respect of loss of freight;

(3) Remuneration due to the owner for assistance and salvage services rendered at any time before the end of the voyage, any sums allotted to the master or other persons in the service of the vessel being deducted.

The provision as to freight apply also to passage money, and in the last resort, to the sums due under Article 4 of the Convention on the limitation of shipowners' liability.

Payments made or due to the owner on policies of insurance, as well as bounties, subventions, and other national subsidies are not deemed to be accessories of the vessel or of the freight.

Notwithstanding anything in the opening words of Article 2, (2), the lien in favour of persons in the service of the vessel extends, to the total amount of freight due for all voyages made during the subsistence of the same contract of engagement.

Article 5

Claims secured by a lien and relating to the same voyage rank in the order in which they are set out in Article 2. Claims included under any one heading share concurrently and rateably in the event of the fund available being insufficient to pay the claims in full.

The claims mentioned under Nos. 3 and 5 in that article rank, in each of the two categories, in the inverse order of the dates on which they came into existence.

Claims secured by a lien and attaching to the last voyage have priority over those attaching to the previous voyage.

Article 6

Claims secured by a lien and attaching to the last voyage have priority over those attaching to previous voyage.

Provided that claims, arising on one and the same contract of engagement extending over several voyages, all rank with claims attaching to the last voyage.

Article 7

As regards the distribution of the sum resulting from the sale of the property subject to a lien, the creditors whose claims are secured by a lien have the right to put forward their claims in full, without any deduction on account of the rules relating to limitation of liability; provided, however, that the sum apportioned to them may not exceed the sum due having regard to the said rules.

Article 8

Claims secured by a lien follow the vessel into whatever hands it may pass.

Article 9

The liens cease to exist, apart from other cases provided for by national laws, at the expiration of one year, and, in the case of liens for supplies mentioned in No. 5 of Article 2, shall continue in force for not more than six months.

The periods for which the lien remains in force in the case of liens securing claims in respect of assistance and salvage run from the day when the services terminated, in the case of liens securing claims in respect of collision and other accidents and in respect of bodily injuries from the day when the damage was caused; in the case of liens for the loss or damage to cargo or baggage from the day of the delivery of the cargo or baggage or from the day when they should have been delivered; for repairs and supplies and other cases mentioned in No. 5 of Article 2 from the day the claim originated. In all the other cases the period runs from the enforceability of the claim.

The fact that any of the persons employed on board, mentioned in No. 2 of Article 2 has a right to any payment in advance or on account does not render his claim enforceable.

As respects the cases provided for in the national laws in which a lien is extinguished, a sale shall extinguish a lien only if accompanied by formalities of publicity which shall be laid down by the national laws. These formalities shall include a notice given in such form and within such time as the national laws may prescribe to the authority charged with keeping the registers referred to in Article 1 of this Convention.

The grounds upon which the above periods may be interrupted are determined by the law of the court where the case is tried.

The High Contracting Parties reserve to themselves the right to provide by legislation in their respective countries, that the said periods shall be extended in cases where it has not been possible to arrest the vessel to which a lien attaches in the territorial waters of the state in which the claimant has his domicile or his principal place of business, provided that the extended period shall not exceed three years from the time when the claim originated.

Article 10

A lien on freight may be enforced so long as the freight is still due or the amount of the freight is still in the hands of the master or the agent of the owner. The same principle applies to a lien on accessories.

Article 11

Subject to the provisions of this Convention, liens established by the preceding provisions are subject to no formality and to no special condition of proof.

This provision does not affect the right of any State to maintain in the legislation provisions requiring the master of a vessel to fulfill special formalities in the case of certain loans raised on the security of the vessel, or in the case of the sale of its cargo.

Article 12

National laws must prescribe the nature and the form of documents to be carried on board the vessel in which entry must be made of the mortgages, hypothecations, and other charges referred to in Article 1; so, however, that the mortgagees requiring such entry in the said form be not held responsible for any omission, mistake, or delay in inscribing the same on the said documents.

Article 13

The foregoing provisions apply to vessels under the management of a person who operates them without owning them or to the principal character, except in cases where the owner has been dispossessed by an illegal act and where furthermore the claimant is not a *bona fide* claimant.

Article 14

The provisions of this Convention shall be applied in each Contracting State in cases in which the vessel to which the claim relates belongs to a Contracting State, as well as in any other cases provided for by the national laws.

Nevertheless the principle formulated in the preceding paragraph does not affect the right of the Contracting States not to apply the provisions of this Convention in favour of the nationals of a non-contracting State.

Article 15

This Convention does not apply to vessels of war, nor to government vessels appropriated exclusively to the public service.

Article 16

Nothing in the foregoing provisions shall be deemed to affect in any way the competence of tribunals, modes or

procedure or methods of execution authorized by the national law.

Article 17

After an interval of not more than two years from the day on which the Convention is signed, the Belgian Government shall place itself in communication with the Governments of the High Contracting Parties which have declared themselves prepared to ratify the Convention, with a view to deciding whether it shall be put into force. The ratifications shall be deposited at Brussels at a date to be fixed by agreement among the said Governments. The first deposit of ratifications shall be recorded in a procès-verbal signed by the representatives of the powers which take part therein and by the Belgian Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Belgian Government, and accompanied by the instrument of ratification.

A duly certified copy of the procès-verbal relating to the first deposit of ratifications, of the notification referred to in the previous paragraph, and also of the instruments of ratification accompanying them, shall be immediately sent by the Belgian Government through the diplomatic channel to the powers who have signed this Convention or who have acceded to it. In the cases contemplated in the preceding paragraph the said Government shall inform them at the same time of the date on which it received the notification.

Article 18

Non-signatory States may accede to the present Convention whether or not they have been represented at the international Conference at Brussels.

A State which desires to accede shall notify its intention in writing to the Belgian Government, forwarding to it the document of accession which shall be deposited in the archives of the said Government.

The Belgian Government shall immediately forward to all the states which have signed or acceded to the Convention, a duly certified copy of the notification and of the act of accession, mentioning the date on which it received the notification.

Article 19

The High Contracting Parties may at the time of signature, ratification, or accession declare that their acceptance of the present Convention does not include any or all of the self-governing dominions, or of the colonies, overseas possession, protectorates, or territories under their sovereignty or authority, and they may subsequently accede separately on behalf of any self-governing dominion, colony, overseas possession, protectorate or territory excluded in their declaration. They may also denounce the Convention separately in accordance with its provision in respect of any self-governing dominion, or any colony, overseas possession, protectorate or territory under their sovereignty or authority.

Article 20

The present Convention shall take effect, in the case of the states which have taken part in the first deposit of ratifications, one year after the date of the procès-verbal recording such deposit. As respects the states which ratify subsequently or which accede, and also in cases in which the convention is subsequently put into effect in accordance with article 19, it shall take effect six months after the notifications specified in article 17, § 2, and article 18, § 2, have been received by the Belgian Government.

Article 21

In the event of one of the Contracting States wishing to denounce the present Convention, the denunciation shall be notified in writing to the Belgian Government, which shall immediately communicate a duly certified copy of the notification to all the other states informing them of the date on which it was received.

The denunciation shall only operate in respect of the state which made the notification, and on the expiration of one year after the notification has reached the Belgian Government.

Article 22

Any one of the Contracting States shall have the right to call for a new conference with a view to considering possible amendments.

A State which would exercise this right should give one year advance notice of its intention to the other states through the Belgian Government, which would make arangements for convening the conference.

PROTOCOL OF SIGNATURE

In proceeding to the signature of the International Convention for the unification of certain rules relating to maritime liens and mortgages, the undersigned Plenipotentiaries have adopted the present Protocol, which will have the same force and the same value as if the provisions were inserted in the text of the Convention to which it relates:

I. It is understood that the legislation of each state remains free

(1) to establish among the claims mentioned in No. 1 of article 2, a definite order of priority with a view to safeguarding the interests of the Treasury;

(2) to confer on the authorities administering harbours, docks, lighthouses, and navigable ways, who have caused a wreck or other obstruction to navigation to be removed, or who are creditors in respect of harbour dues, or for damage caused by the fault of a vessel, the right, in case of non-payment, to detain the vessel, wreck, or other property, to sell the same, and to indemnify themselves out of the proceed in priority to other claimants, and

(3) to determine the rank of the claimants for damages done to works otherwise than as stated in Article 5 and in Article 6.

II. There is no impairment of the provisions in the national laws of the Contracting States conferring a lien upon public insurance associations in respect of claims arising out of the insurance of the personnel of vessels.

Done at Brussels, in a single copy, April 10, 1926.

Maritime Liens and Mortgages Convention, 1926

RATIFICATION:

Belgium	June 2, 1930
Brazil	April 28, 1931
Denmark	June 2, 1930
Esthonia	June 2, 1930
France	August 23, 1935
Hungary	June 2, 1930
Italy	December 7, 1949
Malgache Republic	August 23, 1935
Norway	October 10, 1933
Poland	October 26, 1936
Rumania	August 4, 1937
Spain	June 2, 1930
Sweden	July 1, 1938

DENUNCIATION:

Denmark	March 1, 1965
Finland	March 1, 1965
Norway	March 1, 1965
Sweden	March 1, 1965

ACCESSION:

Algeria	April 13, 1964
Argentina	April 19, 1961
Cuba	November 21, 1983
Finland	July 12, 1934
Haiti	March 19, 1965
Iran	September 8, 1966
Lebanon	March 18, 1969
Monaco	May 15, 1931
Portugal	December 24, 1931
Switzerland	May 28, 1954
Syria	February 14, 1951
Turkey	July 4, 1955
Uruguay	September 15, 1970
Zaire Republic	July 17, 1967